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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~948~~ 117.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLPH, ANSLEY WILCOX, GERRITT B. LANSING, AND EDWIN FLEMING, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, PLAINTIFFS IN ERROR,

vs.

THE DONALDSON LITHOGRAPHING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 11, 1901.

(~~18,199.~~)

(18,199.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 346.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLPH, ANSLEY WILCOX, GERRITT B. LANSING, AND EDWIN FLEMING, DOING BUSINESS UNDER THE NAME OF THE COURIER COMPANY AND THE COURIER LITHOGRAPHING COMPANY, PLAINTIFFS IN ERROR,

vs.

THE DONALDSON LITHOGRAPHING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 26, 1902.

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TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, for the Sixth Circuit.

George Bleistein, et al., Appellants,

vs.

Donaldson Lithographing Company, Appellee.

Stipulation of Counsel as to Printing of Record.

In the above entitled case it is hereby stipulated by the counsel of the parties thereto that the following parts of the record be not printed, to wit:

1st. Exhibits "A," "B," "C," "G," "H," "J," "K," and "L." The said exhibits being large circus posters and hand bills. Exhibits "N," "O," a photographic negative on glass and a print therefrom.

The original exhibits will be considered with the printed record.

2d. The order of claim and delivery and the marshal's return upon it on pages 74 to 77 transcript, because the same appears on pages 16 to 18 transcript.

3d. Notice to take depositions—stipulation as to same and caption to depositions on pages 82, 83, 84 and 85 transcript.

Certificate to depositions on pages 98, 99 and 100 transcript, because not material.

E. W. Kittredge,
Cobb & Howard,
Attys. for Donaldson Lithographing Co.
Wilcox & Miner,
Geo. T. Hogg,
Stallo, Richards & Shaw, and
C. J. & W. W. Helm,
Attorneys for Appellees.

819. Stipulation to print record. Filed Feb. 20, 1900. Frank O. Loveland, Clerk.

United States of America, District of Kentucky, ss.:

At a stated term of the Circuit Court of the United States of America, within and for the District of Kentucky, in the Sixth Judicial Circuit of the United States of America, begun and held at the Federal Court Hall in the city of Covington, Kentucky, in said district, on the first Monday of December, being also the 4th day of that month, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America, the one hundred and twenty-fourth.

Present: Hon. Walter Evans, sitting as Circuit Judge.

Among the proceedings had were the following, to wit:

George Bleistein, John Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business as The Courier Company and The Courier Lithographing Company, Plaintiffs,	At Law.
vs.	
The Donaldson Lithographing Company, Defendant.	

Be it remembered that heretofore, to wit, on the 10th day of June, A. D. 1899, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court, their certain petition against the defendants herein. Said petition was and is in words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company, and The Courier Lithographing Company, Plaintiffs,	Petition.
vs.	
The Donaldson Lithographing Company, Defendant.	

The plaintiffs above named, for their declaration, com-

plaint and petition in this action, allege upon information and belief:

I.

1. That the plaintiffs above named are citizens of the United States and of the state of New York and reside in Buffalo, Erie county, New York, and compose the unincorporated association known as the "Courier Company" and also known as the "Courier Lithographing Company," and that the defendant is a corporation organized under, and existing by virtue of, the laws of the state of Ohio.

2. That heretofore, and prior to the 11th day of April, 1898, said plaintiffs, under the name of the Courier Lithographing Company, designed and engraved a lithographic print, cut or engraving styled "Spectacular Ballet Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 11th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 22966. Library of Congress, to wit:

Be it remembered,

That on the 11th day of April, 1898, The Courier Litho. Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Spectacular Ballet Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions described by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defend-

ant, The Donaldson Lithographing Company, after the recording of the title of said Lithographic print, cut or engraving, and the filing of a description thereof, and contrary to the provisions of the act of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at one hundred thousand, and the value of which, according to such estimate, does not exceed $600; that by reason of the premises and by force of the statutes of the United States, an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copyrighted article, together with all copies thereof, in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possession, of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

II.

I. The plaintiffs refer to and repeat each and all of the allegations contained in paragraph No. 1 of the first cause of action, above set forth, and further allege upon information and belief:

2. That heretofore, and prior to the 11th day of April, 1898, said plaintiffs, under the name of the Courier Lithographing Company, designed and engraved a lithographic print, cut or engraving, styled "Stirk Family Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 11th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case

made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 22959. Library of Congress, to wit:

Be it remembered,

That on the 11th day of April, 1898, The Courier Litho. Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Stirk Family Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions prescribed by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defendant, the Donaldson Lithographing Company, after the recording of the title of said lithographic print, cut, or engraving, and the filing of a description thereof, and contrary to the provisions of the Acts of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at fifty thousand, and the value of which, according to such estimate, does not exceed $300; that by reason of the premises and by force of the statutes of the United States an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copy-

righted article, together with all copies thereof in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possesion of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

III.

1. The plaintiffs refer to and repeat each and all of the allegations contained in paragraph No. 1 of the first cause of action, above set forth, and further allege upon information and belief:

2. That heretofore, and prior to the 18th day of April, 1898, said plaintiffs, under the name of the Courier Company, designed and engraved a lithographic print, cut or engraving styled, "Statuary Act Design," for the purpose of vending the same, and thereafter, before the day of the first publication anywhere, and on the 18th day of April, 1898, deposited a printed copy of the title of the same as aforesaid, and filed a description and two copies thereof, in the office of the Librarian of Congress, at Washington, District of Columbia, pursuant to the provisions of the statutes of the United States, in such case made and provided, and such title was, on said day, recorded in the words following, to wit:

"1898, No. 24345. Library of Congress, to wit:

Be it remembered,

That on the eighteenth day of April, 1898, The Courier Co., of Buffalo, N. Y., hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit:

Statuary Act Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

John Russell Young,
Librarian of Congress.
By Thorvald Solberg,
Register of Copyrights.

Office of the Register of Copyrights, Washington, D. C."

3. That the plaintiffs claim, and have always claimed, the exclusive right to make and sell said lithographic print, cut or engraving, and have printed upon each and every copy made by the plaintiffs the provisions prescribed by the statutes of the United States, to wit: "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."; that the defendant, the Donaldson Lithographing Company, after the recording of the title of said lithographic print, cut, or engraving, and the filing of a description thereof, and contrary to the provisions of the Acts of Congress passed March 2, 1895, and constituting Section 4965 of the Revised Statutes of the United States as amended, and without the consent of the plaintiffs, the proprietors of the copyright above mentioned, fraudulently and knowing the same to be copyrighted, did reproduce, copy, print and publish such design or print, with the intent to deprive the plaintiffs of the benefits of their said copyright, and has sold large numbers of such reproduced print, cut or engraving, and now has in its possession and exposed for sale copies of said design, the actual number of which is unknown to the plaintiffs, but which they estimate at fifty thousand, and the value of which, according to the estimate, does not exceed $300; that by reason of the premises and by force of the statutes of the United States an action has accrued to the plaintiffs, and the defendant has forfeited to them, as the proprietors of said copyright, the plates on which it has reproduced said copyrighted article, together with all copies thereof in the defendant's possession, and has forfeited to the plaintiffs and the United States one dollar for every sheet of the same found in its possession; that the plaintiffs are the owners, and entitled by reason of the facts aforesaid to the possession of all of such plates and reproduced prints; that said plates and prints were made, and are now detained and held, by the defendant wrongfully, fraudulently and unlawfully, and that the plaintiffs are entitled thereto.

Wherefore the plaintiffs pray for the process of this court to the end that all plates and copies of the prints made in violation of their copyrights, as hereinbefore set forth, be seized, forfeited and delivered to the plaintiffs (the value of which is estimated at $1200), and that the plaintiffs have judgment against the defendant for themselves and to the use of the United States in the sum of one dollar for each and every sheet of the lithographic prints, cuts or engravings reproduced, copies, printed and published, as herein set forth, found in the possession of the defendant, and which amount, as estimated by the

plaintiffs, to the sum of twelve thousand dollars ($12,000.00) and that the plaintiffs also have judgment for the costs of this action.

Wilcox & Miner,
Plaintiffs' Attorneys,
616 Ellicott Square, Buffalo, N. Y.
C. J. & W. W. Helm, of counsel,
Newport, Ky.

United States of America, District of Kentucky, County of Kenton, ss.:

John A. Rudolf, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing declaration, complaint and petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

John A. Rudolf.

Subscribed and sworn to before me this 10th day of June, 1899.

Jos. C. Finnell, Clerk.

And on the same day, to wit, June 10th, A. D. 1899, there issued out of the clerk's office of said court, the following summons directed to the marshal of the district, and against the defendant herein; said summons was and is in words and figures following, to wit:

The President of the United States of America, to the Marshal of the Kentucky District—Greeting:

You are commanded to summon The Donaldson Lithographing Company to answer on the first day of the next December term, of the Circuit Court of the United States, for the District of Kentucky, to be held in the city of Covington, a petition filed against it in said court by George Bleistein, John W. Bridgman, John A. Rudolph, Ashley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next December Term of said court.

Witness Hon. Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States, at Covington,

in the said District, this 10th day of June, in the year of our Lord 1899, and of our Independence the 123rd year.

Jos. C. Finnell, C. C. C., K. D.

And afterwards, to wit, June 13, A. D. 1899, came the marshal of the district to whom the aforesaid summons was in form directed, and returned the same into the clerk's office of said court with his proceedings herein endorsed in words and figures following, to wit:

"I hereby certify that I received this writ on the 10th day of June, 1899, and that I have personally executed the same by delivering to Wm. M. Donaldson, president of the Donaldson Lithographing Co., a true copy of the within writ on the 10th day of June, 1899, at his office in Newport, Ky.

A. D. James, U. S. Marshal.
By J. D. Compton, Deputy."

Fee	$2 00
Expense	10
	$2 10

And on the same day, to wit, on June 10, A. D. 1899, the plaintiffs by their attorneys, filed in the clerk's office of said court, their certain affidavit for order of claim and delivery. Said affidavit was and is in words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John W. Bridgman, Jno. A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company, and the Courier Lithographing Company, Plaintiffs,	Affidavit.
vs.	
The Donaldson Lithographing Company, Defendant.	

United States of America, District of Kentucky, County of Kenton, ss.:

John A. Rudolf, being duly sworn, says that he is one

of the plaintiffs in this action and the secretary of the Courier Company and the Courier Lithographing Company, names under which the said plaintiffs do business. That the plaintiffs are owners and proprietors of the following lithographic prints, cuts or engravings, upon which they hold copyrights, to wit: "Spectacular Ballet Design," "Stirk Family Design," and "Statuary Act Design." That said copyrights were duly granted or issued, and recorded in the office of the Librarian of Congress pursuant to the statutes of the United States, and that the plaintiffs have complied with all the provisions of said statutes in reference thereto. That the defendant above named has, in violation of the statute of the United States, passed March 2, 1895, fraudulently and with intent to deprive the plaintiffs of the benefits of said copyrights, reproduced, copied, printed and engraved said copyrighted articles, and now have in their possession and exposed for sale large numbers of copies of said copyrighted articles and the plates or stones on which they were printed, and which are owned by virtue of the statute, and the rights of the plaintiffs in said copyrights, by the plaintiffs, and which ownership or interest is specially prescribed by the said statute; and that by virtue thereof the same are lawfully owned by the plaintiffs.

Affiant further says that said chattels are wrongfully, fraudulently and unlawfully detained by the defendant, and that the alleged cause of the detention thereof, according to the best knowledge, information and belief of the affiant, is the desire to vend the same and make a profit thereon, contrary to the rights of the plaintiffs.

Affiant further says that said chattels have not been taken by virtue of a warrant against the plaintiffs for the collection of a tax, assessment or fine against the plaintiffs, or under any order or judgment of a court of the United States or of any State against them, or seized under an execution against them, distress warrant or attachment against their property or any of them, and that the plaintiffs' cause of action has accrued within one year last past.

Affiant further says that the actual value of said chattels or lithographic prints, cuts or engravings, including the plates or stones (separate value of plates $30), on which they are made, is the sum of $5.75 per thousand sheets, and that the damages for the wrongful making and detention thereof by the defendant is prescribed by said statute of the United States to be $1.00 for each copy thereof found in the possession of the defendant, one-half to the plaintiffs and one-half to the United States.

Affiant further says that the plaintiffs are the owners and entitled to immediate possession of said chatteis described as follows: All plates or stones upon which lithographic prints, cuts or engravings have been reproduced and copied from or in imitation of the plaintiffs' copyrighted prints, cuts or engravings under the titles therein stated, together with all sheets of the reproduced articles so copyrighted found in the possession of the defendant, and estimated by the affiant at 200,000, to wit:

1. "Spectacular Ballet Design."
2. "Stirk Family Design."
3. "Statuary Act Design."

John A. Rudolf.

Subscribed and sworn to before me, this 10th day of June, 1899.

Jos. C. Finnell, Clerk.

And on the same day, to wit, June 10th, A. D. 1899, the plaintiffs, by their attorneys, filed in the clerk's office of said court their certain bond. Said bond was and is in figures following, to wit:

Circuit Court of the United States for the District of Kentucky, at Covington.

Geo. Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

} Bond.

We undertake that the plaintiffs, George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit Lansing and Edwin Fleming, doing business, etc., shall pay to the defendant, The Donaldson Lithographing Co., the damages, not exceeding double the amount of the plaintiffs' claim in this action, which it may sustain by reason of the order of delivery in this action, if the order therefor is wrongfully obtained.

Given under our hands, this 10th day of June, 1899.
Attest: J. D. Compton.

John A. Rudolf, Sec'y The Courier Co.,
Buffalo, N. Y.
The American Bonding and Trust Co.
of Baltimore City.
James M. Sprague, Attorney in fact.
Ben A. Adams, Attorney in fact.

And on the same day, to wit, June 10th, A. D. 1899, there was issued out of the clerk's office of said court an order for claim and delivery. Said order was and is in words and figures following, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

Order. Claim & Delivery.

The President of the United States of America, to the Marshal of said District—Greeting:

Whereas, a declaration and petition and affidavit have been filed in the Circuit Court of the United States for the District of Kentucky, this 10th day of June, 1899, in an action by the plaintiffs above named against the defendant above named, arising under section 4965 of the Revised Statutes of the United States, for the seizure and delivery to the plaintiffs of all the plates and copies of all prints alleged to have been made in violation of three different copyrights owned by the plaintiffs, and described in said petition and affidavit as hereinafter set forth, and praying that the process of the said court issue in that behalf, and that the property hereinafter mentioned be adjudged the property of the plaintiffs, according to the statutes in such case made and provided; and a sufficient bond or undertaking having been filed:

Now, therefore, you are hereby commanded to seize, hold and deliver to the plaintiffs, as prescribed by law, all plates or stones, and copies of all prints, cuts or engravings, found in the possession of the defendant, The Donaldson Lithographing Company, and which reproduce and copy the designs, prints, cuts or engravings covered by the copyrights held by the plaintiffs and described as follows, actual value $5.75 per thousand sheets:

1. "Spectacular Ballet Design."
2. "Stirk Family Design."
3. "Statuary Act Design."

And what you shall have done in the premises, do you make return thereof, together with this writ, on the 3rd day of July, 1899, at ten o'clock in the forenoon of that day if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Covington, Kentucky, this tenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

Jos. C. Finnell, Clerk.

And afterwards, to wit, on June 13, A. D. 1899, the above order was returned to the clerk's office and filed with the endorsement of the marshal thereon. Said endorsement was and is in words and figures following, to wit:

"United States of America, District of Kentucky, ss.:

I hereby certify that I received the within writ on the 10th day of June, 1899, and that I have executed the same by seizing ten thousand five hundred and ninety (10590) eight page prints and thirteen thousand two hundred and five (13205) copies of four page prints as described in the within writ, and five (5) metal electrotype plates, and have the same now in my possession.

A. D. James, U. S. Marshal,
By J. D. Compton, Deputy."

Fee $1.50
Expense 10

$1.60

And on a day following, to wit, November 27, A. D. 1899, came the defendant, by its attorneys, and entered its appearance and filed its answer herein. Said appearance was and is in words and figures following, to wit:

United States Circuit Court.

George Bleistein et al.,

vs.

The Donaldson Lithographing Co.,

No. 2128.

To the Clerk of said Court:

Please enter our appearance as solicitor and of counsel on behalf of defendant.

E. W. Kittredge, and
Cobb & Howard,
Solicitors for Defendant.

Said answer was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

Answer.
No. 2128.

Now comes defendant, and for answer to the declaration, complaint and petition of plaintiff, and to each paragraph and cause of action thereof, says:

It admits that it is a corporation duly organized under the laws of the State of Ohio.

Further answering, it denies each and every other al-

legation therein contained and asks to be hence dismissed with its costs.

E. W. Kittridge,
Cobb & Howard,
Attorneys for Defendant.

State of Ohio, County of Hamilton, ss.:

Wm. H. Donaldson, being duly sworn, says that he is Sec'y & Treasurer of the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated upon information and belief, and that as to these matters he believes it to be true.

Wm. H. Donaldson.

Signed in my presence and sworn to before me, this 27th day of November, A. D. 1899.

Oliver G. Bailey,
Notary Public in and for Hamilton County, Ohio.

And afterwards, to wit, on December 12, A. D. 1899, an entry was made on the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 556.

By consent of counsel for plaintiff and defendant, the court being advised, it is now ordered that D. A. Brown be and he is appointed official stenographer to report this case, and it is agreed that his fees shall be taxed as a part of the costs in this case.

And on the same day, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 556.

This cause coming on for trial, came the parties, plaintiff and defendant, by their respective attorneys, and having announced ready for trial, came the following jury, to wit: G. T. Raynold, C. S. Griffith, H. H. Reed, Thos. J. Judy, Mat. Conley, Marshall Sleet, D. W. Meyers, John McConnell, C. L. McDaniels, Aaron Owens,

David Martin and R. S. Cowan, who were elected, tried and sworn well and truly to try the issue joined. The jury heard the evidence of plaintiff. Whereupon came the defendant, by its attorneys, and moved the court to instruct the jury to find for defendant. The court not being fully advised, and the usual hour for adjournment having arrived, takes time, and the further consideration of this case is continued until to-morrow morning at 9 a. m.

And on a day following, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 557.

This day came again the parties hereto, by their respective attorneys; came again the jury impaneled and sworn herein. The court now being advised, sustains said motion of defendant to instruct the jury to find for defendant. To which ruling of the court plaintiffs, by their attorney, come and except. Thereupon the court charged the jury and instructed them to return a verdict for defendant. Whereupon, in accordance with said instructions of the court, the jury returned the following verdict to wit:

We, the jury, find for the defendant.

T. J. Judy, Foreman.

Upon which verdict it is ordered by the court that the defendant have and recover of the plaintiffs its costs herein had and expended to be taxed by the clerk.

And on the same day, to wit, December 13, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures following, to wit:

Journal 8, Page 557.

On motion of plaintiffs, by their attorneys, they are given sixty days in which to prepare and tender bill of evidence.

And on the same day the court filed its written opinion.

(Opinion will be found in full in bill of Exceptions.)

And on the same day, to wit, December 13, A. D. 1899. plaintiffs, by their attorneys, filed motion and grounds for a new trial herein. Said motion and grounds for new trial were and are in words and figures following, to wit:

United States Circuit Court.

George Bleistein et al.,
Plaintiffs,
vs.
The Donaldson Lithographing Co.,
Defendant.

Now comes the plaintiffs and moves the court for a new trial herein, and for ground therefore assigns that the court erred:

1. In sustaining objections to testimony offered by the plaintiff and excluding same.

2. In sustaining the motion of the defendant to charge the jury to find for the defendant, and in so charging.

Wilcox & Miner, and
C. J. & W. W. Helm,
Attorneys for Plaintiffs.

And on a day following, to wit, December 18th, A. D. 1899, an entry was made in the Journal of said court, clothed in words and figures as follows, to wit:

Journal H, Page 558.

This cause coming on to be heard on the motion of the plaintiffs for a new trial herein, the court being fully advised, is of the opinion that same should not be granted and it is ordered that said motion be and same is overruled.

And on a day following, to wit, January 20, A. D. 1900, a petition for writ of error was filed in the clerk's office of said court. Said petition was and is in words and figures following, to wit:

Circuit Court of the United States for the District of Kentucky.

Geo. Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,	At Law.
vs.	
The Donaldson Lithographing Company, Defendant.	

Petition for Writ of Error.

Now comes George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, plaintiffs herein, and say that on the 13th day of December, 1899, this court entered judgment herein in favor of the defendant, and against these plaintiffs, in which judgment and the pleadings had prior thereto in this cause, certain errors were committed, to the prejudice of these plaintiffs, all of which will in detail appear from the assignment of errors, which is filed with the petition.

Wherefore these plaintiffs pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Wilcox & Miner,
Geo. T. Hogg,
C. J. & W. W. Helm,
Stallo, Richards and Shaw,
Attorneys for Plaintiffs.

And on the same day, to wit, on January 20, A. D. 1900, the following Assignment of Errors was filed in the Clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, for the District of Kentucky.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs, vs. The Donaldson Lithographing Company, Defendants.	At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon trial of the same, to wit:

1. The court erred in the rejection of evidence offered by the plaintiff upon said trial in the following instances, to wit:

(1). In rejecting as testimony the following parts of page 129 of Vol. 15, No. 2, whole No. 354, April 20, 1898, of "Catalogue of Title entries of books and other articles entered in the office of the Register of Copyrights Library of Congress, at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies."

"Spectacular Ballet Design (1898, No. 22,966, Apr. 11, 2 copies received Apr. 11, 1898.) 11

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Statuary Act Design (1898, No. 24,345, Apr. 18, 2 copies received Apr. 11, 1898.) 15

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Stirk Family, Design (1898, No. 22,959, Apr. 11, 2 copies received Apr. 11, 1898.) 18

Copyright by Courier Lithographing Company, Buffalo, N. Y."

(2). In refusing to allow the witness George Bleistein to answer and tell the jury what was the custom of the trade in regard to the ownership or control of "special matter," which it was avowed he would do as follows: "The custom of the trade when special matter is ordered is that it shall not be used during the continuance of the contract for other parties than those ordering it; but that

thereafter it may be used at the pleasure of the company printing it."

(3). In refusing to allow a negative and photograph printed from it, of the spectacular ballet design reducing the size of the picture from that of the lithographs of plaintiffs to the prints made by defendant, which were seized.

(4). In refusing to allow the plaintiffs to show by the witness, Bleistein, that the employe, Bandlow, who made the designs of the lithographs, Exhibits "A," "B" & "C," had been engaged in making similar lithographic designs which were copyrighted by the plaintiffs, under the name of the Courier Lithographing Company, as proprietors, during the four years which it had been shown that he had been employed by the plaintiffs.

II. The court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III. The court erred in overruling the motion of plaintiff for a new trial.

The court erred in entering judgment in favor of the defendant and against the plaintiff.

Wilcox & Miner,
Geo. T. Hogg,
C. J. & W. W. Helm,
Stallo Richards, and Shaw,
Attorneys for Plaintiffs.

And on the same day, to wit, on January 20, A. D. 1900, an entry was made upon the Journal of said court, clothed in words and figures following, to wit:

Journal H, Page 572.

The plaintiffs, George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, considering themselves aggrieved by the judgment herein entered on the 13th day of December, 1899, come now and present to the court their petition for a Writ of Error to the United States Circuit Court of Appeals, for the Sixth Circuit, together with an Assignment of Errors, asserted and intended to be urged in that behalf.

On consideration whereof, the court orders that on a bond as provided by law, being filed in the sum of five hundred dollars, to the acceptance of the court, the said writ of error be allowed, and it is ordered that a transcript

of the record, proceedings and papers, upon which the judgment of this court was rendered in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals, according to law in such case provided.

And on a day following, to wit, on January 23, A. D. 1900, a bond was filed in the Clerk's office of said court, which was and is in words and figures following, to wit:

Know all Men by These Presents, That we, George Bleistein, John W. Bridgman, et al., as The Courier Co., as principals, and The American Bonding and Trust Company, of Baltimore, Md., as sureties, are held and firmly bound unto the Donaldson Lithographing Company in the full and just sum of five hundred ($500.00) dollars, to be paid to the said The Donaldson Lithographing Company, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of January, in the year of our Lord one thousand nine hundred.

Whereas, lately at a term of the Circuit Court of the United States for the District of Kentucky, at Covington, in a suit depending in said court, between George Bleistein, John W. Bridgman, John A. Ridolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, doing business as the Courier Co. and the Courier Lithographing Co., plaintiffs, and The Donaldson Lithographing Company, defendant, a judgment was rendered against the said George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, doing business as the Courier Co. and The Courier Lithographing Co., and the said George Bleistein, et al., doing business as the Courier Co., and The Courier Lithographing Co., having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Donaldson Lithographing Co., citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the seventeenth day of February next.

Now, the condition of the above is such, that if the said George Bleistein, et al., doing business as The Courier Co. and the Courier Lithographing Co., shall prosecute their Writ of Error to effect, and answer all damages

and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

Jos. C. Finnell.

The Courier Co. and the Courier Lithographing Co.,
By C. J. & W. W. Helm, Attys.
The American Bonding and Trust Company, of Baltimore City,
By W. W. Helm, Vic. President,
By Webster Helm, Assist. Sec'y.

Approved by
Walter Evans,
District Judge.

And on January 20, A. D. 1900, a Bill of Exceptions, which had been signed, sealed and approved by the court, was filed herein. Said Bill of Exceptions was and is in words and figures following, to wit:

United States Circuit Court, for the District of Kentucky, sitting at Covington.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendants.

At Law. No. 2128.

Before Hon. Walter Evans and a jury.

Bill of Exceptions.

Appearances.

For plaintiffs: Wilcox & Miner, by George T. Hogg, of counsel; C. J. & W. W. Helm; Stallo, Richard & Shaw.

For defendant: Kittredge & Wilby, by E. W. Kittredge; Cobb & Howard, by Orris P. Cobb.

Covington, December 12, 1899.

Be it remembered, that heretofore, to wit, at the December term, A. D. 1899, of the Circuit Court of the United States for the District of Kentucky, upon the day and date above written, came the parties, the plaintiffs in person and by their attorneys, and the defendant in person and by its attorneys, and this cause came on for trial on the issues joined by and between the parties, before the Hon. Walter Evans, District Judge, and a jury duly impaneled and sworn.

Thereupon the plaintiffs, to maintain the issues on their part, introduced the following evidence and testimony, to wit:

George Bleistein, one of the plaintiffs, was called in behalf of the plaintiffs, and being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hogg:

Q. State your name and place of residence to the jury.
A. George Bleistein, Buffalo, N. Y.
Q. What is your business?
A. A printer and lithographer.
Q. Are you president of the Courier Company?
A. Yes.
Q. And also a member of it?
A. Yes.
Q. Will you give the names of the other members that compose the Courier Company?
A. John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, Edwin Fleming and myself.
Q. Is the Courier Company an unincorporated association?
A. It is.
Q. Consisting of these men you have named.
A. Yes, sir.
Q. Mr. Bleistein, I show you a copy of a lithograph which is marked "Exhibit A" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?
A. I do.
Q. What is the name of it; what do you call it?
A. We call that the "Statuary Act."
Q. Where was the original of that design engraved?
A. In the Courier Company's office, Courier Lithographing Company.
Q. In Buffalo?

A. Yes.

Mr. Hogg: I ask to have that marked and offered in evidence.

Mr. Kittredge: We object to its admission.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit A, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made a part hereof.)

Q. I show you a copy of a lithograph marked "Exhibit C" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?

A. I do.

Q. What is the name of it?

A. It is known as "The Stirk Family" lithograph.

Q. Where was it designed and engraved?

A. In the office of the Courier Company, Courier Lithographing Company.

Q. At Buffalo?

A. Yes, Buffalo, New York.

Mr. Hogg: I ask to have that marked and offered in evidence.

Mr. Kittredge: We object.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit B, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made part hereof.)

Q. I show you a lithograph marked Exhibit "B" by Henry B. Loveland, Notary Public. Do you recognize that lithograph?

A. I do.

Q. What do you call it?

A. "Spectacular Ballet."

Q. Where was that lithograph designed and engraved?

A. Office of the Courier Company, Courier Lithographing Company, Buffalo, New York.

Mr. Hogg: I desire to offer that in evidence and have it marked.

Mr. Kittredge: We object.

(Said lithograph now offered in evidence and marked "Plffs. Exhibit C, 12|12|99, D. A. B.," received over the objection and exception of counsel for defendant, and is hereto attached and made a part hereof.)

Q. You have used the words "Courier Company" and "Courier Lithographing Company." Does the Courier Company do a portion of its business under the name of "Courier Lithographing Company"?

A. It does.

Q. Mr. Bleistein, did the Courier Company engrave any other lithographs than those which have been shown to you under the titles that we have named?

A. How do you mean, under the titles that you have named?

Q. Did they make two "Spectacular Ballet" bills, or just one?

A. Just one.

Mr. Hogg: If the court please, I offer in evidence a certified copy of the Librarian of Congress, showing the deposit of the title "Spectacular Ballet" and the description, also a certificate under seal showing the filing of two copies of the lithographs; also the same kind of certificates with reference to the "Stirk Family" design and the "Statuary" design. They are all fastened together, and I would ask that they be considered as read.

The Court: Let them be received.

(Same now offered in evidence and marked "Plffs. Exhibit E, 12|12|99, D. A. B.," being all these certificates as follows, to wit:

1898. No. 22,966.

Library of Congress, to wit:

Be it Remembered:

That on the eleventh day of April, 1898, the Courier Lithographing Company, of Buffalo, New York, hath deposited in this office the title of a lithograph, the title or description of which is in the following words, to wit: Spectacular Ballet Design. Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of the Register of Copyrights, Washington, D. C.

John Russell Young,
Library of Congress.
By Thorvald Solberg,
Register of Copyright.

1898. No. 22966.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Spectacular Ballet Design were deposited in this

office by the Courier Litho. Co. of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on entry 22966 of 1898 to complete copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

1898. No. 22959.

Library of Congress, To Wit:

Be it Remembered:

That on the eleventh day of April, 1898, the Courier Litho. Co. of Buffalo, N. Y., hath deposited in this office the title of the lithograph the title or description of which is in the following words, to wit:

Stirk Family Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of Register of Copyrights,
Washington, D. C.

John Russell Young,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyrights.

1898. No. 22959.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Stirk Family Design were deposited in this office by the Courier Litho Co. of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on Entry No. 22959 of 1898, to complete copyright.

In witness whereof, the seal of the Librarian of Con-

gress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

1898. No. 24345.

Library of Congress, To Wit:

Be it Remembered:

That on the eighteenth day of April, 1898, the Courier Co. of Buffalo, N. Y., hath deposited in this office the title of a lithograph the title or description of which is in the following words, to wit:

Statuary Act Design.

Description on file.

The right whereof it claims as proprietor in conformity with the laws of the United States respecting copyrights.

Office of Register of Copyrights,
Washington, D. C.

John Russell Young,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyrights.

1898. No. 24345.

Library of Congress,

Copyright Department.

Washington, D. C.

I hereby certify that two copies of the lithograph entitled Statuary Act Design were deposited in this office by the Courier Company of Buffalo, N. Y., on the eleventh day of April, 1898, and were credited on Entry No. 24345 of 1898, to complete copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed, this 16th day of November, 1899.

Herbert Putnam,
Librarian of Congress,
By Thorvald Solberg,
Register of Copyright.

(10 cent revenue stamp.)

The Court: The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law—it might be whether the proper person has applied for obtaining the copyright.

Mr. Hogg: I will also offer in evidence, if the court please, page 129 of the Official Catalogue of Title Entries of books and other articles entered in the office of the Register of Copyrights, Library of Congress, Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies, and especially the particular entries thereon, which I will ask the stenographer to mark at page 129 (indicating same).

(Said entries appear at page 129 of a pamphlet or book entitled on the title page thereof, "Library of Congress, Office of the Register of Copyrights, Washington, D. C.)

Catalogue of Title entries of books and other articles entered in the office of the Register of Copyrights, Library of Congress at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies.

Vol. 15, No. 2, Whole No. 354, April 20, 1898." The entries marked by the stenographer with initials "D. A. B." on said page 129 of said pamphlet or book being as follows, to wit:

"Spectacular Ballet Design. (1898, No. 22966, Apr. 11, 2 copies rec'd Apr. 11, 1898.) 11

Copyright by Courier Litho. Co., Buffalo, N. Y."

Also "Statutory Act. Design. (1898, No. 24345, Apr. 18, 2 copies rec'd Apr. 11, 1898.) 15

Copyright by Courier Litho. Co., Buffalo, N. Y."

Also "Stirk Family. Design. (1898, No. 22959, Apr. 11, 2 copies rec'd Apr. 11, 1898.) 18

Copyright by Courier Litho. Co., Buffalo, N. Y."

Mr. Kittredge: We object to the introduction of the above on the ground that the pamphlet or book is not any document which is admissible in evidence at all.

The Court: Does the statute provide what publication shall be made?

Judge Helm: That is the original publication provided to be made by the Secretary of the Treasury every two weeks.

The Court: That adds nothing, as I understand, to the certificate.

Mr. Hogg: It is cumulative.

Mr. Kittredge: We don't think it cumulative. It is irrelevant therefore.

Mr. Hogg: It is Section 4958 of the law, if your honor cares to read it.

The Court: I think those need not be read. I do not think that is meant to be evidence, only certain information. I think all that is necessary is the deposit of the copies if subject to copyright.

Mr. Hogg: Do I understand your honor to exclude it?

The Court: I overrule the motion to introduce that part of the book as evidence.

Mr. Hogg: To which we except and ask that it be made a part of the record.

Cross Examination.

By Mr. Kittredge:

Q. I understood you to say you were president; what are you president of?

A. I am president of the Courier Company and the Courier Litho. Co.

Q. Are those two companies?

A. It is known as two companies, but it is practically one company. A portion of the business is done under the name of the Courier Lithographing Company.

Q. And neither of them incorporated?

A. Yes, sir.

Q. Do you say yes they are?

A. Is it either you said? I thought you said neither.

Q. Which one is incorporated?

A. The Courier Company.

Q. The Courier Company is incorporated?

A. Yes, sir.

Q. How is it with the Courier Lithographing Co., does that do business with the Courier Company?

A. It is a part of the Courier Company.

Q. The Courier Company is a corporation under the laws of New York?

A. That is an unincorporated joint stock association.

Q. By a "joint stock association" you mean that it is a joint stock association under the laws of New York?

A. Yes, unincorporated, an unincorporated joint stock association. We have to file certificates.

Q. Do I understand you to say that the Courier Company is incorporated as a joint stock company under the laws of New York, and has filed a certificate?

A. It is an unincorporated joint stock association under the laws of New York.

Q. And you are the president of that joint stock company?

A. Yes, sir.

Q. And the Courier Lithographing Company is a part of the Courier Company?

A. Yes, sir.

Q. Another name in which the Courier Company does business?

A. Yes, sir.

Q. Mr. Bleistein, those three pictures that have been introduced, who were they made for? (Referring to Exhibits A, B and C heretofore offered by plaintiff.)

A. They were sold to Mr. Wallace.

Q. They were made, were they not, under contract with Mr. Wallace for them?

A. Yes, practically so.

Q. Mr. Wallace is the gentleman whose picture is in the corner here (indicating on one of said exhibits)?

A. Yes, sir.

Q. They were made under a contract with them and for them. Did you make the contract?

A. I don't remember that I made that specific one, the year that these were printed in.

Q. Who did represent the joint stock company in making that contract?

A. Either Mr. John A. Rudolf or myself.

Q. Can't you tell whether it was yourself?

A. I am not positive. Some years Mr. Rudolf did. I rather think Mr. Rudolf did.

Q. The Wallace Company is a circus company, is it not?

A. Mr. B. E. Wallace, yes, owns the Wallace Show.

Q. Known as the "Wallace Show," and this was made under contract with them as an advertisement of their show, wasn't it?

A. Yes.

Q. Never has been made for anybody else, has it?

A. Not up to the present time that I know of.

Q. That's what I am asking about. And the contract was there. Mr. Wallace was in Buffalo—or where was this contract made with Mr. Wallace?

A. I think it was made in Peru, Indiana, where he lives.

Q. Where Mr. Wallace lives? That is true in reference to each of those papers?

A. Yes.

Q. What you have said about the one I have been showing to you—which was the Ballet picture—is true as to each of them? (Referring to said Exhibits A, B and C above.)

A. Yes, sir.

Q. That is to say, they were made for Mr. Wallace under contract with him as an advertisement for his show, and they have never been made for anybody else?

A. Not up to the present time.

Q. That's all I ask about.

A. Only as the Donaldson Lithographing Company used them.

Mr. Kittredge: That was not covered by my question and I ask to have it ruled out.

The Court: Go ahead.

Q. Mr. Bleistein, how long have you been in this business?

A. I have been with the Courier Company ever since I have been in business.

Q. How many years is that?

A. Twenty-three or twenty-four years.

Q. Do you know what are called stock papers of advertisements that are made for circus companies?

A. I have known such things, yes.

Q. Do you know what is meant by "stock papers"?

A. Yes.

Q. What is meant by "stock papers"?

A. Stock paper is paper printed and up on the shelves that you will sell to any one.

Q. And what are "special papers"?

A. Special papers are gotten up for the use of people for a certain length of time, as long as they choose to use them.

Q. For special people?

A. Yes, sir, and in special quantities.

Q. Under a contract with them?

A. Sometimes.

Q. And as long as they are got up for them, they are not entitled to be used by anybody else, are they, by the understanding of the trade?

A. The understanding of the trade is, that you would not sell them to any one whether they are copyrighted or not.

Q. That is "special papers"?

A. That is special papers.

Q. You would not sell them to any one except parties for whom they were got up?

A. Not if we had an agreement to that effect.

Q. But if they were got up as special papers, that is the understanding of the agreement?

A. As a general rule.

Q. And that is generally known in the trade, is it not?

A. Yes, sir.

Q. Now these are special papers, all three of them? (Still referring to Exhibits A, B and C above.)

A. Yes, sir.

Q. Got up under contract with Wallace under the understanding that you have stated?

A. Yes.

Re-direct Examination.

By Mr. Hogg:

Mr. Hogg: Counsel has used the words "incorporated" and "unincorporated"—

The Court: You don't need to go into that.

Mr. Hogg: I wanted to ask the witness what he intended to say, that's all.

Q. You intended to say unincorporated or incorporated, which?

A. I think the last time I did say—I did say all through unincorporated joint stock association.

Q. (By Mr. Kittredge:) I forgot to ask one question: I want to know the date when the certificate of the joint stock company was filed. I forgot to ask you the date of it. How long ago was it?

A. We are obliged under the law to file every year with the Comptroller of the State of New York, and also with the county clerk of Erie County, where Buffalo is located, a certificate showing the officers of the company and the stockholders.

Q. Yes. I ask you what date you commenced, when you first did that?

A. Oh, the Courier Company was — the Articles of By-laws were first started some twenty-four or twenty-five or twenty-six years ago, at any rate.

Q. At any rate long prior to this agreement with Wallace?

A. Oh, yes.

Q. (By Mr. Hogg:) This special work that the counsel has asked you about and your agreement not to sell to anybody else, I would ask you to state to the court whether or not you do sell it to anybody else after the party is through with it.

Mr. Kittredge: I object.

The Court: You went into this. Let's see about it. What is your answer to that, Mr. Witness?

The Witness: Yes, sir.

(To which the defendant, by counsel, then and there excepted.)

Q. What is the custom of the trade in that regard?

The Court: No, I can not see the materiality of that.

(To the excluding of which question by the court the plaintiffs, by counsel, objected and excepted, and avowed as follows:)

(Avowal.)

The plaintiff avows that he can prove by the witness upon the stand that the custom of the trade when special matter is ordered is, that it shall not be used during the continuance of the contract for other parties than those ordering it; but that thereafter it may be used at the pleasure of the company printing it and copyrighting it—

The Court: Copyrighting it is the thing. The custom of the trade has nothing to do with it. You can not prove that by him. You can not prove your whole case in an avowal. I will allow the avowal as to the one question.

Judge Helm: I want to show what we think we can prove the custom of the trade is.

The Court: That won't let copyrighting in.

Judge Helm: Leave copyrighting out, as your honor suggests.

The Court: The court sustains the objection.

(To which ruling of the court counsel for plaintiffs then and there excepted.)

By the Court:

Q. I want to ask which one of these lithographs here is what you call the "Statuary Act"?

(Witness indicates for answer Exhibit A., heretofore offered in evidence.)

Q. I see on that the words "Landing of Columbus." What does that mean?

A. It means that that statue is an act supposed to represent the Landing of Columbus.

Q. And all this other—

A. Represents things according to the description.

Q. Who designed that?

A. Designed by the Courier Company, at Buffalo, by our man.

Q. Which one of your men?

A. I think that was designed by a man named August Bandlow.

Q. When?

A. I can't give the exact date. Just some short time before we received the copyrights, just immediately the first proof was sent to Washington.

Q. When was this first published?

A. It was first published when it was sent, the first copy of it was sent to Washington, just two copies sent to Washington for copyright, and none were issued till shipped to Mr. Wallace.

Q. How does the Buffalo Company, or the Buffalo Lithographing Company become proprietor of this engraving or picture?

A. Because in our contract with Mr. Wallace, and with all the shows, we simply agree to furnish a stated amount of paper, whether it is old or new, for a certain amount of money per sheet. We reserve rights of design that we put in our copyright. We copyright that with the simple view that as long as Mr. Wallace uses that, he has the right to use it; but if he ceases to use that bill—say he does not do the Statuary Act next year—we have the right with that design to sell to other people who may want to use that sort of thing.

Mr. Kittredge: I want to move to rule this answer out.

The Court: I want first to see whether that company is the proprietor of this.

Q. (By the Court.) I ask you how the plaintiffs in this case, or either of them, became the proprietor of that design?

The Witness: Because—

The Court: Just say how, don't say because.

The Witness: I thought I explained it. We reserve the right to copyright, and that has been the custom for years.

Q. How do you become proprietor of that design?

A. By having it made by one of our men, his original, own idea.

Q. What was that—one of the plaintiffs in this case?

A. No.

Q. He is not one of the plaintiffs and has no interest in your company?

A. None whatever. He is an employe.

Q. And he designed that?

A. He did.

Q. By what mode did he transfer his right and proprietorship in that design to you?

A. His mode and right of proprietorship he never had, because we engage his talent and his services and pay for them. What he does produce belongs to us, because we pay for it to him.

Q. That is, the only right you have got to it is that he is your employe—is an employe of yours, and he designed this?

A. We engage his talents. We pay for his talents.

Q. You have no other sort of title to this, it is not manifested in any other way?

A. Not that I know of. We simply pay for his talent.

Q. Now referring to this next one, "The Stirk Family"; who designed that?

A. I think Mr. Bandlow did. I am quite sure he did that too. We have two or three men doing that class of work. I am nearly sure he did it.

Q. He was the author and designer of that?

A. I presume he was.

Q. You don't know?

A. I won't swear positively. We had two men. The one with the ballet I am absolutely positive about.

Q. Not the Ballet, but the other one, this Statuary scene?

A. I am quite sure Mr. Bandlow did—I think Mr. Rudolf, who is more in charge of the details of the work, can explain that.

Q. But you understand that one of your men designed it and he has never made to you any transfer of that design further than you assume ownership of it because he was in your employ; is that the fact?

A. Yes, we engage his talents, and what he produces belongs to us.

Q. Have you your contract with him?

A. We have no contract.

Q. Who designed those three?

A. Mr. Bandlow.

Q. You don't think you have any right to it except as it is derived from his being in your employ? What sort of work is that?

A. Lithograph work, done by stone.

Q. All three of them lithograph work?

A. Yes, sir.

Mr. Hogg: I would like to ask one or two questions suggested by your honor's questions.

Q. When you said you had no contract with Mr. Bandlow, you meant you had no written contract?

(Objected and excepted to by counsel for defendant.)

A. No written contract. He is engaged at so much per week salary.

Q. How long has he been in your employ?

A. Mr. Bandlow has been with us I think about four years.

Q. State whether or not Mr. Bandlow has been engaged during the four years he has been in your employ in this kind of work?

(Objected to by counsel for defendant. Objection sustained, to which counsel for plaintiff excepted.)

The Court: These three are all you can inquire about.

Q. State what your agreement with Mr. Bandlow was.

Mr. Kittredge: He says simply so much per week.

The Court: Let him state what the agreement was.

The Witness: My agreement with Mr. Bandlow is, that he was to receive while in our employ $100.00 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property, for consideration of that he was to receive $100.00 per week.

Mr. Kittredge: I move to exclude that answer.

(Motion overruled, to which defendant by counsel then and there excepted.)

Re-cross examination:

By Mr. Kittredge:

Q. Were you present and did you see Mr. Bandlow working on either of these designs (referring to Exhibits A, B and C)?

A. Yes.

Q. Which one did you see him at work on?

A. I think—I know I saw him at work on the Ballet Bill.

Q. You know you saw him at work on that?

A. Yes, sir.

Q. Did you see him at work on either of the others?

A. I am quite sure I did on the Statue Act, but would not swear positively.

Q. You won't swear positively, but think you saw him working on the Statue Act?

A. I don't think—I know.

Q. Well, you do swear positively—

A. You asked me the question while you had that in your hand.

Q. You won't swear to the Statuary?

A. You had that in your hand.

Q. Was it from a photograph that that picture of Mr. Wallace was made?

Judge Helm: We object. There is no claim in connection with this as to the picture of Mr. Wallace. The whole claim is as to the figures there constituting the Ballet Dance.

Mr. Kittredge: That may be true. There is nothing in the certificate of copyright.

The Court: Did you furnish a copy of that whole thing when you copyrighted it?

The witness: Yes.

The Court: Then you can answer.

(To which counsel for plaintiffs then and there excepted.)

Q. Who furnished that head?

A. I dare say Mr. Wallace or one of his agents, I presume.

Q. Who furnished you all this descriptive matter here—who furnished you that red, and this name of the show, etc.

A. You mean the reading matter?

Q. The reading matter, all of it, the heading and footing of it?

Judge Helm: I want to save an exception to that.

The Court: That is part of it. You have introduced that as the real thing.

Mr. Kittredge: That was sent to Washington.

The Court: If you say now that this was the thing you published—

Q. (By Mr. Kittredge). The descriptive matter has not been read to your honor. Who furnished that head and all that reading matter?

A. Mr. Wallace's representatives.

Q. That is true of each of those pictures?

A. Yes.

Q. Were you present when you made—is that the one you think you were present, the Statuary, when it was made?

A. No, I saw him working at it.

Q. You said in answer to his honor, the judge, that that is representative of the "Landing of Columbus." Don't you know that each one of those was intended to represent a part of the performance of the Wallace Circus Company; don't you know each one of those pictures was what the Wallace Circus Company professed to exhibit to the public?

A. I presume that is so.

Q. Don't you know it is so?

A. Well, I don't—

Q. Don't you know that that was intended to represent as a part of their advertisement of what they were going to show to the public at their circus, what they were going to present—each one of these pictures?

A. That is what they expected to do, I presume, when we got it out.

Q. That was true in reference to the bicycle picture, wasn't it?

A. Yes, sir.

Q. That was true in reference to the Ballet?

A. Yes, sir.

Q. Who informed you, or furnished information to you concerning that, that was what they intended to ex-

hibit to the public, that they intended to present a ballet of that kind?

A. Mr. Wallace simply wanted us to get up a—

Q. Now, answer my question. Who informed you?

A. I am trying to do that.

Q. Answer my question. It is a simple question; who informed you that that was—that they intended to present a ballet of that character?

A. Mr. Wallace or his agent informed us that they were going to present a ballet. Whether it was just of that character or not, I don't know.

Q. Who informed you that they were going to present the scene of the bicycle performance?

A. Mr. Wallace or his agent, I dare say.

Q. Who informed you that they intended to present these statuary pictures as a performance in their circus?

A. Mr. Wallace, or his agent, I dare say; not that they were to have these very same things. They were left to us to design.

By Judge Helm:

Q. One question: I want to ask you this, Mr. Bleistein, were these engravings or these drawings made from descriptions given you by Mr. Wallace's show, or any employe of that show, or were they the creation of your employes?

(Objected to by counsel for defendant. Objection overruled, to which defendant by counsel then and there excepted.)

A. They were the creation of our employes, principally.

Q. Take the ballet matter; was that principally, or was it not entirely your creation?

A. Entirely.

Mr. Kittredge: That is objected to as leading. I don't see why they should be allowed to put the answers in the mouth of their own client.

The Court: Let him answer the question. We can't argue all these little points.

(To which counsel for defendant excepted.)

Q. And the same question as to the Statuary design. Was that the entire creation of your artist?

(Objected and excepted to by counsel for defendant as to form.)

A. Now, I am not absolutely positive about that, entirely the creation.

And also John A. Rudolf, one of the plaintiffs, called in behalf of the plaintiffs being first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Hogg:

Q. Where do you reside?
A. In Buffalo, New York.
Q. What is your business?
A. Secretary of the Courier Company.
Q. You are one of the plaintiffs to this action?
A. I am.
Q. You have charge of the lithographic work of the Courier Company?
A. I have charge of the lithographic work department, as well as all other departments.
Q. I show you a memorandum. Is that in your handwriting (handing witness)?
A. It is.
(Same exhibited to counsel for defendant at his request.)
Q. Having refreshed your recollection from that memorandum, are you able to state when the first of the three lithographs, "The Stirk Family" design, "Spectacular Ballet" design, and "Statuary Act" design, left the office of the Courier Company?
Mr. Kittredge: Wait a minute. I don't know when he made this memorandum. He can't make a memorandum to testify from on the stand.
Q. Was that memorandum made on the day it appears to be on the paper?
A. March 24, 1898.
Q. (By Mr. Kittredge.) Do I understand the witness to testify that this writing was made on March 24th?
A. You do, sir.
(Question above now read to witness, viz.):
Q. Having refreshed your recollection from that memorandum, are you able to state when the first of the three lithographs, "The Stirk Family" design, "Spectacular Ballet" design, and "Statuary Act" design, left the office of the Courier Company?
A. I am.
Q. What was that date?
A. April 11th.
Q. Where were they shipped?
A. Peru, Indiana.
Q. What time were they due there?

A. April 15, according to contract.

The Court: The real inquiry is, whether these copies were sent to the Librarian of Congress before they were published. That is the whole thing.

Mr. Kittredge: It is the dates that we want.

The Court: You can ask him about the dates on the cross-examination.

Q. By Mr. Hogg): Mr. Rudolf, what is the book which you hold in your hand?

A. The letter copying book of the lithograph department of the Courier Company.

Q. Having refreshed your recollection from an examination of that book, are you able to state the day the copyrighted bills which have been referred to here were sent to Washington, together with the applications for copyright?

A. I can.

The Court: Now state the date.

The Witness: The Spectacular Ballet and the Stirk Family were sent, left our office April 9, 1898.

Q. Now, the Statuary Act Design?

A. The Statuary Act Design left our office on the 15th day of April, 1898.

Q. By mail?

A. By mail.

By Mr. Kittredge:

Q. Let me see what you refer to, to refresh your memory, if you will.

A. There is a copy of our letter to the Librarian of Congress, notifying him of the fact and giving a description of the lithographs.

Q. Where is the other one you referred to?

(Witness silently indicates page.)

Q. Page 85, this letter is on; what page is the other on?

A. I have not got to it yet.

Mr. Kittredge: I want to see these exhibits he is refreshing his memory about.

(The witness turns over leaves and points to another place in book.)

Mr. Kittredge: That is page 206?

A. Yes, sir.

By Mr. Hogg:

Q. Were you present when the marshal seized some bills under the order of claim and delivery issued in this case?

A. I was.

Q. Are those specimens of the bills seized (handing to witness)?

A. They are.

Mr. Hogg: I will offer these in evidence.

(Same received and marked "Plffs.' Exhibits G, H, I, J, K. L, 12|12|99, D. A. B.," respectively.)

Q. I show you a photograph (handing witness); did you see it taken?

A. I did. It was made under my instructions.

Q. Was it made from this bill which I hold in my hand?

A. It was.

Q. Is that the same as Exhibit B (referring to Plffs.' Exhibit B, 12|12|99, D. A. B." heretofore offered.)?

A. Yes, sir.

Mr. Hogg: I offer that photograph in evidence.

Mr. Kittredge: We object. What for?

Mr. Hogg: For the purpose of comparing. It is just the same as what we claim you have infringed.

Mr. Kittredge: We object to this. That can't aid the proof of infringement.

Judge Helm: We are offering that for the purpose that the jury may compare that which is reduced to the exact size of this. By laying the negative upon the picture that we seized, it will be seen that line for line they correspond. Therefore, it is very material that the jury may make that comparison. We are proving by this witness that he was present when they were made, this photograph reduced from—

(Said photograph above referred to, marked "Plffs.' Exhibit N, 12|12|99, D. A. B.," and the negative designated as "Plffs' Exhibit O, 12|12|99, D. A. B.," and said marking placed upon reverse of photograph because impossible to mark on the glass. Said two exhibits were tied together.)

The Court: What you want to do is to compare those that were copyrighted. That is the only thing you can do.

(Objection sustained, to which plaintiff by counsel then and there excepted.)

Cross Examination.

By Mr. Kittredge:

Q. If I understand you, you sent these copies to John Russell Young, referred to in your letter, April 9, 1898, by express?

A. Yes, sir.

Q. And you sent the other by mail on April 15, and not in a registered letter?

A. Yes, sir.

Q. Can you turn in your letter book to your letter in which you made your first shipment the 11th of April to Mr. Wallace (handing witness letter copy book marked on back, "Litho. letters from April 5 to May 11, 1898")?

A. I can't turn in that book; it is not in there.

Q. Where is it?

A. Here. (Indicating a different letter book.)

Q. Can you turn to your letter book of that date, to the letter addressed to Mr. Wallace on the 11th of April?

A. Here is a letter from Mr. Franklin dated on the 8th.

Mr. Kittredge: May I see it? Will your honor pardon me while I read it? I have not seen this.

The Court: You have no right to look at the defendant's letter book. You can ask when the first shipment was made to Wallace.

The Witness: On the 11th.

Q. I ask if you wrote a letter accompanying the shipment?

A. I think we wrote a letter. We notified them three days in advance of the shipment, and wrote them the day after the shipment. We have both letters here.

Q. I would like to see the one you wrote the day after the shipment.

A. That was mailed to the agent of the—

The Court: Have you got the letter to Wallace?

Mr. Kittredge: No, sir, we have not. I wish we had.

Judge Helm: You could have had it by taking his deposition, or proving that you couldn't get it.

Mr. Kittredge: I don't know about that. I want the letter you wrote when you made this shipment, or as you say, the day after.

Judge Helm: Read the letter.

Mr. Kittredge: But first I want to read it.

The Court: You have to take the chances. You have no right to look into their letter book. If you had notified them you might introduce secondary evidence; but you can't compel them in this way to show their own letter book in their possession.

Q. What date do I understand you to say this was shipped to the Wallace Company?

A. April 11.

Q. All three of them?

A. Yes, sir.

Examined by the Court:

Q. How long before this date had those copies that were sent been published?

A. Sent to Wallace?

Q. Yes.

A. Well, as far as the definite number of days, your honor, it would be hard for me to tell. Some of them were finished every day—some two or three weeks before.

Q. Some of these copies were finished two or three weeks before?

A. No, the entire edition was finished at one time.

Q. Which ones were printed and published before, or ten or twelve days before this shipment was made to Wallace?

A. That I couldn't say.

Q. You can't tell which one?

A. There is no printer can tell that.

Q. As a matter of fact, I mean?

A. The only thing I can say, they were shipped on the 11th, they were printed previous to that; but how many days sooner than that it is impossible for me to answer that question.

Q. What was the earliest that some of those copies had been printed—how many days before the 11th?

A. That I say—if you could ask that question in a different way—it was our method as soon as bills were completed, to send the first two copies that were completed to Washington.

Q. I know that. They have all said that. But how long were any of those copies that you sent to Washington printed before you sent that letter of the 11th?

A. We sent two of them on the 9th—

Q. To Wallace?

A. To the Librarian.

Q. You don't understand. How long before the 11th of April had you printed any of those copies that you sent to Wallace?

A. I couldn't tell you how many days before.

Q. You don't know?

A. No, sir, I don't; it is impossible in the volume of our business.

Q. You said some of them had been printed ten or twelve days before?

A. They may. Those were not the only ones printed for Mr. Wallace at that time.

Q. It is not worth while to mention any others. I want to get the exact dates when you sent those to the Librarian.

A. April 9th, two of them.
Q. And the other was when?
A. April 15th.
Q. And the shipment to Wallace?
A. Went on the 11th.
Mr. Kittredge: All three of them to arrive there on the 15th, stipulated?
The Witness: Yes, sir, that's right, sir.

By Mr. Kittredge:

Have you got the letter that you said accompanied the shipment with you here?
A. I have not.
Q. The letter of the 12th of April to Wallace?
A. I don't know whether there was a letter written to Mr. Wallace or not. I said that those letters of shipment go to the agent.
Q. What agent?
A. To Mr. Wallace's agent.
Q. Have you the letter that accompanied your shipment, to his agent, or that was written about the shipment to his agent?
A. I have not.
Q. You say that was written on the 12th?
A. They usually follow the day after they are shipped.

Re-direct Examination.

By Judge Helm:

Q. I want to ask this question, suggested by the judge's interrogation: Were any of those bills issued to the world from your office prior to the time you shipped them to Wallace's Show?
A. There wasn't a single copy of either of those bills left our office except the ones that we sent to Washington.
Q. There wasn't a single one?
A. Not one. The first bill of this description, except the ones that went to Washington, were sent to Wallace or his agent, April 11th.
Q. You say you were present when these bills you have filed here were seized in Mr. Donaldson's lithographing establishment?
A. I was.
Q. What, if anything, did Mr. Donaldson say in reference to the time they were seized—the elder Mr. Donaldson?
A. Mr. Donaldson showed me one of his Ballet Designs, and asked me whether I considered it an infringe-

ment of my design. I told him I was not answering those kinds of questions; and he further told me that he knew that we had a copyrighted design of the Ballet bill that we had made for Wallace, and which he gave to his artists so that they would not copy our designs.

Q. (By the Court:) You say these that you seized were exactly like those, the whole of them?

A. No, sir, I don't claim that.

Q. (By Judge Helm:) Did you make the contract with Wallace Bros.?

A. With Wallace I did.

Mr. Kittredge: Which contract?

Judge Helm: I mean the contract for the using of these bills that were to advertise—

The Court: We won't go into that.

Judge Helm: The other side went into it with Mr. Bleistein and proved that special matter was prepared for Wallace Bros. We reserve the right, if necessary, in rebuttal to introduce that.

By Mr. Kittredge:

Q. Did I understand you to say that the seizures were not all like these (indicating the plaintiffs' Exhibits G to L, heretofore offered this date)?

A. I said nothing of the kind.

The Court: What he said was, that he didn't claim that those seized were exactly like these in all respects.

Judge Helm: Your honor is in error. There was a large lithograph like that; and that was not an exact reproduction of this Ballet, but these smaller ones are all exactly reproductions.

The Witness: They are not, because the protraits and that lettering is left off.

Judge Helm: We want to offer the order of claim and delivery and the marshal's return upon it as testimony in the case.

(The same being as follows:)

Wilcox & Miner,
Attorneys for Plaintiffs.
Office and Post Office Address,
Room 816 Ellicott Square,
295 Main Street, Buffalo, New York.

Returned and filed June 13, 1899.
Jos. C. Finnell, Clerk,
By L. M. Van Dyke, D. C.,
Security.

Mr. Kittredge: We object to this.

The Court: Wait till we see what connection it has with the case.

And also J. D. Compton, a witness called in behalf of the plaintiffs, being first duly sworn, was examined and testified as follows, to wit:

Direct Examination.

By Judge Helm:

Q. You are the deputy marshal in this district?

A. Yes, sir.

Q. Did you have this order of claim and delivery for execution (handing to witness original of the foregoing)?

A. I did, yes, sir.

Q. Did you execute it?

A. I did.

Q. What did you do in executing it?

A. I took these copies here, took them and stored them, the copies and plates.

Q. How many copies did you take, and of what?

Mr. Kittredge: I want to know whether the copies he took are of this character (indicating Plffs's Exhibits G to L, inclusive).

The Court: He says that those are introduced in evidence.

The Witness: Ten thousand five hundred and ninety (10,590) eight-page prints, and thirteen thousand two hundred and five (13,205) copies of four-page prints, as described in the writ, and five (5) metal electrotype plates.

Q. Have you those in your possession?

A. Yes, sir, we have them stored.

Judge Helm: We want to offer them in evidence; but don't suppose the court will require us to bring them into court.

Mr. Kittredge: Samples of them will do.

(Same considered as received in evidence.)

Q. I will ask you to look at these and point out which one of them is the eight page print which you say you seized 10,590 copies of. (Calling witness' attention to "Plffs.' Exhibits G to L of this date.")

A. This is it. (Witness indicates Plffs.' Exhibit marked "K, 12|12|99 D. A. B.")

Q. Which is the four-page print of which you say you seized thirteen thousand two hundred and five (13,205) copies?

(For answer the witness indicated "Plffs.' Exhibit marked "G, 12|12|99, D. A. B.")

Q. (By Judge Helm:) And you received five (5) metal electrotype plates. It is considered that this witness identifies them in testimony?

Mr. Kittredge: If he identifies them as the plates from which these two were struck.

Judge Helm: I don't know as he can do that. He don't know anything about the business.

The Witness: I have not got the plates. I can get them.

Judge Helm: It is understood we are offering those plates that he seized.

Mr. Kittredge: Yes, only I want to reserve my right to object when they come.

Q. Where did you seize those?

A. I think it was in June.

Q. No, I said where did you seize them?

A. In Newport, corner Sixth & Washington Avenue.

Q. In whose establishment?

A. Donaldson Lithographing Company.

Q. Who was present when you seized them?

A. Mr. Donaldson, I believe.

Q. Which Mr. Donaldson—the gentleman sitting there?

A. That gentleman, William Donaldson (indicating the elder Mr. Donaldson).

Q. President of the Donaldson Lithographing Company?

A. Yes, sir.

Q. And did he assist in gathering them together for you?

A. He did.

Q. Do you remember what, if anything, he said in connection with these matters at the time that you seized them—I mean in connection with his knowledge of their being copyrighted?

A. No, I can't say that I do. I remember that he said it was unfortunate that I came in so late; that he didn't know much about where they were located, and the men that did know were gone. I believe he said to me though that they were not infringements.

Mr. Kittredge: I don't care to ask him any questions. When the plates come we may want to ask.

And also the depositions of John G. Miller, Burt Hagle and George A. Scheffler, now read in evidence on behalf of the plaintiffs by Mr. George T. Hogg, as follows, to wit:

John G. Miller, being first duly cautioned and sworn, deposes and says on being questioned by counsel for plaintiffs:

My name is John G. Miller. I reside at No. 58 Welker St., Buffalo, N. Y. Am foreman in the pasting and shipping department of the Courier Company, Buffalo, N. Y. I have charge of the shipment of lithographs for circuses, and did have in 1898. I keep a record of the various circus bills that are shipped by the Courier Co., and did in 1898. I remember three certain bills printed by the Courier Co. in 1898, and known as "Spectacular Ballet Design," "Stirk Family Design" and "Statuary Act Design." I am able to state the day the first of each of said bills left the Courier Co.'s plant; where they were shipped to, and the time they were to be ready for delivery at their destination, and who they were shipped to. All three bills were shipped at one time; they were shipped to one consignee; there were three boxes; they were all shipped to W. R. Musgat, agt. for the Wallace Shows at Peru, Ind., on April 11, 1898, and were due at destination on April 15, 1898. In speaking of bill I mean Circus Bills. Witness was here shown copies of three circus bills. Same are marked for identification respectively, Exhibit "A," "B" and "C," Exhibit "A" being "Statuary Act Design," Exhibit "B" being "Spectacular Ballet Design," and Exhibit "C" being "Stirk Family Design." I recognize these three bills, they are copies of the three bills shipped on April 11, 1898, by me to W. R. Musgat, Agt. All three bills so shipped had on them these words, "Copyright 1898, Courier Litho. Co., Buffalo, N. Y." The bills shipped April 11, 1898, were the first bills shipped of these three designs.

On cross-examination by Orris P. Cobb, of counsel for Deft., Mr. Miller, the witness testified as follows:

Q. You are foreman in the posting and shipping department?

A. I am.

Q. You are not the book-keeper?

A. I am not. I am my own book-keeper in my own department.

Q. Aside from any memoranda you may have, have you any independent recollection as to the date of shipping these bills?

A. No.

Q. You fixed the date in your testimony from certain records you had before you and not at all from your recollection, did you not?

A. Yes.

Q. You ship circus bills and matters of that sort almost daily, do you not?

A. I do.

Q. And it would be impossible for you to remember the date of shipping these particular bills, would it not?

A. It would.

Q. You do remember, however, as you have testified, that all three boxes were shipped at the same time to the agent of the Wallace Show at Peru, Ind., do you not?

A. I do.

Q. Each box contained one kind of bills, one of them containing Exhibit "A" or similar bills, another containing duplicates of Exhibit "B" and another duplicates of Exhibit "C." Is that correct?

A. No, sir. There were three boxes, but they contained many different bills besides these three. The bills were packed in the different boxes according to their size. There were some of each design in each box. The reason for this is that there were different sizes of each design, for instance, Exhibit "A," "The Statuary Act Design," just shown me, is what we call one sheet, as are also Ex. "B" and "C." There were 216 each of duplicates of A, B and C Exhibits. Then there were 72 each of Statuary Act Design and Stirk Family Design in what we call 12-sheet form, being a larger size and 72 of the Spectacular Ballet Design in what we call the 15-sheet size, and also 144 of what we call 1-2-sheet size of the Stirk Family Design. There were other bills in this shipment entirely different, which I have not specified.

Q. Your answer to this last question is not given from your memory, but by referring to a record, is it not?

A. Yes, sir.

Q. Who keeps this record?

A. I do.

Q. Will you please tear out a sheet from this record and attach to this your deposition in order that we may see a form in which you keep this record?

A. Yes, sir, I now do so. Same is received and marked Exhibit "D."

Q. Do you know what these different articles you have described, including Ex. A, B and C, and including the different sizes you have described, are used for?

A. They are used for advertising purposes for circuses.

Q. They were the first bills you shipped of Ex. A, B and C?

A. They were.

Q. And all three were shipped April 11, the time you stated?

A. They were.

Q. You have testified that they were due in Peru, April 15, 1898. How do you fix this date?

A. They were undoubtedly ordered due there at that time.

Q. But how do you know they were ordered due there at that time?

A. My shipping order was marked to be due there at that time.

Q. Who gave you this order?

A. It was sent us from the office.

Q. And came from some member of the Courier Co.?

A. It did.

Q. And that is the extent of your knowledge concerning it, is it?

A. Yes, except that I can tell by the handwriting; it was the handwriting of John A. Rudolf, the Manager.

Q. Do you know of your own knowledge whether these goods were shipped by freight or express?

A. By freight.

Q. And do you know of your own knowledge how long it would take these goods to reach Peru, Ind., from Buffalo by freight?

A. I could not tell.

Q. Then when you testified in direct examination that these articles were due in Peru, Ind., April 15, 1898, you referred solely and only to the fact that they were ordered to be delivered there on or before that date, April 15, 1898. Is this correct?

A. Yes, sir.

Q. Do you know who ordered them to be delivered there on or before April 15?

A. I do not.

Q. You only know the order that came to you that you have already mentioned, do you?

A. Yes, sir.

Q. You have testified that all of the duplicates of Exhibits A, B and C contained the words "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y." How do you know this, if at all?

A. Because I am the one that sees that the articles are sent to Mr. Edward Rudolf, who is the one who attends to having these articles copyrighted.

Q. Then Mr. Rudolf would know about this feature of it, would he?

A. He would know whether those words Copyright, &c., were on the stone.

Q. What would you know, if anything, of your own knowledge as to whether the words "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y.," were or were not on the sheets shipped, as you have testified, to Peru, Ind.?

A. I know of my own knowledge that the words "Copyright, &c.," were on the stone, and therefore must be on all the bills, and I packed the bills.

Re-direct Examination.

The record which I have here and which I show and from which I have testified is in my own handwriting, and it was made at the time, i. e., April 11, 1898. I have a general recollection of this shipment, but have to refer to this record to refresh my memory as to details. When in my cross-examination the counsel used the words "on or before" with reference to April 15, 1898; I gave my answer without thinking of the word "before." I know nothing about that word being in the order. I know that the words "Copyright, 1898. Courier Litho. Co., Buffalo, N. Y.," were on the larger bills as well as on the small bills we have here, and which are marked Exhibits A, B and C.

Re-cross Examination.

Q. You have testified on re-direct examination that you have a general recollection of packing these bills, which you refreshed by referring to records. So far as dates are concerned you have no recollection, have you, but rely entirely upon the record?

A. Yes, sir.

John G. Miller.

Taken, read over, subscribed and sworn to before me this 4th day of December, 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

Burt J. Hagle, being first duly cautioned and sworn, deposes and says, on being questioned by Mr. Geo. T. Hogg, counsel for plaintiff:

I reside at 750 Humboldt Pky., Buffalo, N. Y. I am the shipping clerk of the Courier Co., and have been for 10 years last past. I keep a book of shipments that I make for the Courier Company. I have here with me that record book. I am making shipments constantly

and can not remember any particular shipment except by reference to my books.

Q. Will you examine your book as to April 11, 1898, and tell us what you have there?

A. I have here "Buffalo, N. Y., April 11, 1898, Wabash R. R. Co. rec'd from the Courier Co. three boxes Adv. matter, 1,760 lbs., marked W. R. Musgat, Agt. Wallace Shows, Car 1, Peru, Ind. Paid owners risk. Charges $7.74."

Q. What was that you just read?

A. That is the original receipt of the Wabash R. R., bearing the signature of George R. Layher.

Cross-Examination.

Q. Do you know the contents of these boxes?

A. No, sir.

Burt J. Hagle.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

George A. Scheffler, being first duly cautioned and sworn, and upon examination by Geo. T. Hogg, Esq., of counsel for plaintiff, deposes and says:

I am George A. Scheffler. I reside at No. 115 West Mohawk Street, Buffalo, N. Y. My business is journal clerk in the Courier Company and assistant to the manager.

Q. Did you during the year 1898 keep the accounts of the Courier Co. with the Wallace Shows?

A. Yes.

Q. From whom did you receive the items of work charged against the Wallace Show people?

A. From Mr. Miller, i. e., John G. Miller.

Q. What is the date of the first items for bills known as "Statuary Act Design," "Spectacular Ballet Design" and "Stirk Family Design"?

A. April 11, 1898.

Q. Did you make out bills from the books kept by you and render them to the Wallace Show people?

A. Yes.

Q. Were those bills paid?

A. Yes.

Q. You have refreshed your recollection of the dates you have given from your books?

A. I have.

Q. Do you know the date that the first shipment of the bills mentioned were ordered for, and the place where they were to be on the day for which they were ordered?

A. I know the day mentioned on the order slip showing when the bills were due.

Q. When was that?

A. April 15, 1898.

Q. Where?

A. Peru, Ind.

On cross-examination by Orris P. Cobb, of counsel for defendant, witness testified as follows:

Q. You have mentioned in your testimony in chief two dates, viz., April 11, 1898, and April 15, 1898. Do you fix these dates simply from a record or records or from your memory?

A. From records.

Q. Entirely from records, do you not?

A. Yes, sir.

Q. What is the Courier Co., a corporation or partnership?

A. I do not know.

Q. The shipment you testified as having been made April 11, 1898, was not a shipment of duplicates of one only of Exhibits A, B and C, but was shipments of duplicates of all three of them, was it not?

A. Yes, all three of them, and also the other bills.

Q. You testified on direct examination that the shipment of duplicates of these three bills which you say were made April 11, 1898, was due in Peru, Ind., April 15, 1898. Explain more fully what you mean by this?

A. The shipment was due on that date as indicated by the slip—the shipping slip sent me by Mr. Rudolf. The date April 15 is the date designated as the time these goods were to reach Peru, Ind.

Q. Explain, if you can, who fixed this date as the time of delivery there—please go into the matter more fully as to how this date was fixed and why.

A. The answer to that will be, that circuses give the date when they want printing at destination, and presumably this date was upon the original order.

Q. You mean that this date was upon an original order left with or sent to the Courier Co. by the proprietor of the Wallace Show, do you?

A. Yes.

Q. And this date was of sufficient importance for the Courier Co. to make a record of. Please explain why it was so important?

A. The shipment was due there April 15, 1898, in order to be in time to go out in their advertising car.

Re-direct.

Q. When, in your examination, you have mentioned books and records, do you mean books and records kept by yourself?

A. Yes.

Q. Is it usual for orders for circus bills to specify the time and place of delivery, that is, orders to the Courier Co., with which you are familiar?

A. Yes, as a general rule.

Geo. A. Scheffler.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
Notary Public,
(Seal.) Erie County, N. Y.

Said Exhibit "D," attached hereto and made part hereof, bearing the mark "Exhibit, D, H, B, L, Dec. 4|99, and official seal of Henry B. Loveland, notary public in and for Erie county, N. Y., is as follows:

Original Order.	This Shipment.	No. Days. Shipped to Date	On Hand
150 Days.	Days.	Days.	Days.

Shipping List No. 1.

Bills and Printing

Shipped to

The Great Wallace Shows.

To ———————————

——————— Boxes ———————————

Via ——————— R. R. ———————

From the Courier Company.

Buffalo, ——————— 1898.

No. of Sheets.	Name of Bills.	No. per Day.	Total.
15	Ballet	4	
12	General animal	4	

12	Stirk Family, Bicyclists	4
12	Statuary	4
12	Riders	4
12	General Aerial	4
12	Nelson Family, Acrobats	4
9	Lady Flat Race	4
9	Revolving Trapeze	4
9	Hay animals	4
9	Cat animals	4
9	Freaks, curious people	4
9	Elephant and camel race	4
6	Portrait	4
6	Stirk Family, bicyclists	4
6	Statuary	4
6	Special bill—Lady Rider	4
6	Robert Stickney, Jr., bareback rider	4
6	Stilt and comic skaters	4
6	Nelson Family, acrobats	4
4	Chariot race	4
4	Hay animals	4
4	Cat animals	4
4	Female principal	4
4	Ballet	4
4	Aerial	4
2	Menagerie	4
2	Circus	4
2	Hippodrome	4
2	Features	4
2	Spiral Globe	4
2	Parade	4

Window Work.

1	Menagerie	8
1	Circus	8
1	General animal	8
1	Chariot and standing race	8
1	Stirk Family, bicyclists	12
1	Statuary	12
1	Nelson Family, acrobats	12
1	Riders	12
1	Ballet	12
1	Aerial	8
1	Stilt and comical skaters	8
1	Revolving trapeze	8
1	Elephant and camel race	8
1	Portrait	8
1	Freaks, curious people	8

A. Yes.

Q. And this date was of sufficient importance for the Courier Co. to make a record of. Please explain why it was so important?

A. The shipment was due there April 15, 1898, in order to be in time to go out in their advertising car.

Re-direct.

Q. When, in your examination, you have mentioned books and records, do you mean books and records kept by yourself?

A. Yes.

Q. Is it usual for orders for circus bills to specify the time and place of delivery, that is, orders to the Courier Co., with which you are familiar?

A. Yes, as a general rule.

Geo. A. Scheffler.

Taken, read over, subscribed and sworn to before me this 4th day of Dec., 1899.

Henry B. Loveland,
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(Seal.) Erie County, N. Y.

Said Exhibit "D," attached hereto and made part hereof, bearing the mark "Exhibit, D, H, B, L, Dec. 4|99, and official seal of Henry B. Loveland, notary public in and for Erie county, N. Y., is as follows:

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9	Lady Flat Race	4
9	Revolving Trapeze	4
9	Hay animals	4
9	Cat animals	4
9	Freaks, curious people	4
9	Elephant and camel race	4
6	Portrait	4
6	Stirk Family, bicyclists	4
6	Statuary	4
6	Special bill—Lady Rider	4
6	Robert Stickney, Jr., bareback rider	4
6	Stilt and comic skaters	4
6	Nelson Family, acrobats	4
4	Chariot race	4
4	Hay animals	4
4	Cat animals	4
4	Female principal	4
4	Ballet	4
4	Aerial	4
2	Menagerie	4
2	Circus	4
2	Hippodrome	4
2	Features	4
2	Spiral Globe	4
2	Parade	4

Window Work.

1	Menagerie	8
1	Circus	8
1	General animal	8
1	Chariot and standing race	8
1	Stirk Family, bicyclists	12
1	Statuary	12
1	Nelson Family, acrobats	12
1	Riders	12
1	Ballet	12
1	Aerial	8
1	Stilt and comical skaters	8
1	Revolving trapeze	8
1	Elephant and camel race	8
1	Portrait	8
1	Freaks, curious people	8

1 Robert Stickney, Jr., bareback rider.. 8
1-2 Nelson Family, acrobats 8
1-2 Stirk Family, bicyclists 8
1-2 Spiral Globe 8
1-2 Leon and Mule 8

Judge Helm: The marshal informs me that the electrotype plates referred to in his testimony are over on Monmouth street, Newport. Will it be necessary to have them here this afternoon?

Mr. Kittredge: It is not necessary until to-morrow morning. I would say that if I can have an opportunity to confer with my client about it, I will try to dispense with their coming here. I will try to do so during the adjournment.

Judge Helm: I simply ask for the convenience of the marshal.

At a later stage of the proceedings, to wit, during argument, while the jury were withdrawn, the court suggested to counsel for defendant that it would be well to admit that the electrotype plates should be considered as offered, to which counsel for defendant replied: "I will agree to that; want to anyhow."

The Court: I want to get it straightened out, if you please. Which one of these designs did the letter of April 9, 1898, refer to?

Mr. Hogg: The letter to the Librarian of Congress referred to the Spectacular Ballet and the Stirk Family designs; and the letter of April 15th referred to the Statuary Act Design.

Mr. Kittredge: I have not seen those letters, if your honor please. They were not permitted to be shown me.

The Court: I want to know definitely also whether these copies were sent by mail.

Mr. Hogg: Those sent on April 9th were sent by express. Those on April 15th went by mail.

Mr. Kittredge: Not in a registered letter?

The Court: That does not make any difference if they went by mail.

Mr. Hogg: Now, Mr. Kittredge, there are the two letters. You can examine them at your leisure.

The Court: Which went by express of those two?

Mr. Hogg: The last one was sent by mail. I will also offer in evidence the acknowledgment by the Librarian of Congress of the receipt of those letters.

Mr. Kittredge: The letters of the Librarian of Congress are not competent in evidence. If you offer them, I object.

The Court: The filing in the department is sufficiently shown by the undenied averments of the petition itself, and the certificates you have already offered in evidence. Outside private letters we are not concerned with. You may consider in evidence the certificates Mr. Helm holds in his hand. (Referring to "plffs' Exhibit E, 12|12|99, D. A. B.," heretofore set out.)

Mr. Hogg: I will offer in evidence the official receipt, bearing the postmark and official signature of the Librarian of Congress, of a letter and the title of description that was mailed April 15th.

The Court: You have already introduced official evidence of that.

Mr. Hogg: The distinction is that this is the official certificate which shows when it was received in Washington. The receipt also shows the day it was mailed.

Judge Helm: Your honor takes judicial notice of the signature of all executive officers under the statute.

The Court: All official papers, of course. Let them be tendered.

(Same now received in evidence and marked "Plffs' Exhibit M, 12|12|99, D. A. B.," being an official postal card bearing upon its address side the following:

"Librarian of Congress,

Office of the Register of Copyrights.

Official Business.

Penalty for Private Use, $300.00.

The Courier Litho. Co. Buffalo, N. Y."

And the reverse of said postal card containing the following printed matter, which was read to the jury, to wit:

Library of Congress,

Washington.

Office of the Register of Copyrights.

April 30, 1898.

The Courier Litho. Co,:

Dear Sirs—In accordance with the application contained in yours of 15th copyright entry has been made un-

der date of April 18, 1898, for your lithos entitled "Statuary Act Design," and one other title.

Copyright certificate will follow in about 40 days.

Respectfully,

John Russell Young,

Librarian of Congress.

By Thorvald Solberg,

Register of Copyrights."

"Notice of copyright entry A."

And said postal card further having stamped with rubber stamp across the reverse side thereof the following: "Received May 2, 1898."

The Court: Now, on April 30, the Librarian writes that on April 18th it was received?

Judge Helm: Yes, his letter dated the 15th—that is the Statuary Act Design.

Mr. Kittredge: That relates only to the Statuary Act Design.

The Court: You have no such paper relating to the other two?

Mr. Hogg: The others were sent by express; so we rely upon the dates as shown by those certificates included in plaintiffs' Exhibit E. The others we rely upon the date they were mailed, because those referred to in Exhibit E were sent by express, which the statute does not seem to comtemplate.

And thereupon the plaintiffs rested their cause.

And the foregoing together with the exhibits referred to therein and made a part hereof is all the testimony and evidence offered or given by the plaintiff upon the trial of this cause.

Mr. Kittredge: I want to move to exclude specifically each of these Exhibits A, B and C; and I want also at this stage of the case to ask for peremptory instructions for the defendant. I should like to be heard on this subject.

The Court: State why in a word.

Mr. Kittredge: In the first place, if your honor please, I want to say with reference to the Statuary Exhibit—I will make my special objection first with reference to that Statuary Exhibit—it is alleged in the petition and is in fact copyrighted on the 18th of April, and the publication plainly shows it was prior to that. That is a specific objection to that one upon that ground specifically—that is the statuary.

The Court: Now, as to the other two?

Mr. Kittredge: The specific objection to this one, the Ballet, is that it is an immoral picture; and the general objection that I make to them all is, that they are none of them subject matter of copyright. They are all mere matter of advertising.

The Court: I should like to know whether any of your witnesses will prove, so far as you have them here, the arrival of those boxes of goods before the 11th of April?

Mr. Kittredge: We have already proved they were due on the 15th. Our witness will be here in the morning, Mr. Wallace, who will testify, I think, that they were received at or before that date.

The Court: "At" might not be important; "before" may be very important.

Mr. Kittredge: The 15th is before the 18th, and on their own testimony this was published before copyright was taken.

The Court: If I understand you, you move first to exclude those Exhibits A, B and C, and then move for peremptory instructions?

Mr. Kittredge: Yes, sir.

At a later stage the court announced that defendant's motion to exclude Plaintiffs' Exhibits A, B and C was overruled.

(To which overruling of their said motion by the court to exclude said exhibits, defendant, by counsel, then and there excepted.)

The Court having duly cautioned the jury, excused them until 9:00 a. m., Wednesday, December 13, 1899, whereupon the jury withdrew from the court room and argument proceeded upon the pending motion, and particularly as to that branch of the same covering defendant's motion for peremptory instructions in its favor and against the plaintiffs, and the court, being sufficiently advised by counsel reserved its ruling on the motion for the present, and adjourned until 9:00 a. m., Wednesday, December 13, 1899.

Second day, Wednesday, Dec. 13, 1899.

Court met pursuant to adjournment. Now come again the jury impaneled herein, and hearing of this cause resumed.

And the court having heard the objections by counsel for plaintiffs to the granting by it of the pending motion for peremptory instructions to the jury to find for the de-

fendant and being sufficiently advised, upon consideration the court delivered a written opinion, to wit:

United States Circuit Court, District of Kentucky, sitting at Covington.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, Plaintiffs,

vs.

The Donaldson Lithographing Company, Defendant.

This is an action to recover $12,000.00 for the alleged infringement by the defendant of certain copyrights, being at the rate of $1 each for all the copies of the things copyrighted which were found in the possession of the defendant. The claim to this sum of money is based upon Section 4965, of the Revised Statutes of the United States, which as amended, reads as follows:

"Section 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary or model or design intended to be perfected and executed as a work of fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; provided, however, that in case of any such in-

fringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and, provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print or model or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall not be less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

The three subjects of copyright described in the plaintiffs' petition, are, first, an engraving called "Spectacular Ballet Design," which is made up of a line of a dozen or more figures of females in ballet costumes of the most flashy style; second, an engraving called the "Stirk Family Design," which is a series of representations of fancy or trick bicycle ridings; and, third, an engraving called the "Statuary Act Design," which is made up of pictures of certain statuary. Each of the engravings was designed and engraved at Buffalo, N. Y., and at least one of them by an employe of the plaintiffs, the Courier Company, and all were designed for use of show bills, and as advertisements for the Wallace Circus.

The proof does not appear to warrant a claim (and which, indeed, is not made), that there was any infringement of a copyright of a photograph made from an object not of the fine arts, which would be a case that would limit the recovery of any sum between $100.00 and $5,000.00, as fixed in the proviso of the section just copied. The broad claim made in the plaintiffs' petition is that they are entitled to recover under the clauses of the section which fix the sum to which they are entitled at $1 per sheet. The court, however, is strongly inclined to the opinion that if the plaintiffs are entitled to recover at all the limits for such recovery are between $250.00 and $10,000.00, as fixed in the last clause of the section above copied, as, if there is any infringement, it may be of the copyright of a "print." In any event there is raised a very important question, and one which, in this case, and in one which came before me at the last term, has received my most careful consideration.

Clause 8, of Section 8, of the Constitution of the United States, among other things, gives to Congress power "to

promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In attempting to exercise that power Congress has made statutory provisions relating to the subject of copyrights. Among those provisions are Secs. 4952, 4956, 4957, 4962, and 4965 of the Revised Statutes. The first two of these, as amended, and so far as applicable to this case, read as follows:

"Section 4952. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary or of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns, of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. . . .

"In the construction of this act the words 'engravings,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office."

"Section 4956. No person shall be entitled to a copyright unless he shall on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or chromo or a description of the painting, drawing, statue, statuary or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print or photograph, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same; provided, that in the case of a book, photograph, chromo or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the

United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, or from transfers made therefrom."

It will be seen that the prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts. That this must necessarily be the question in this connection seems to be apparent from the language of that part of Section 4952 in regard to the construction of the words "engraving," "cut" and "print" as used in the statute. The statute provides that those words "shall be applied only to pictorial illustrations or works connected with the fine arts." If the words "pictorial illustrations" are to be taken independently of the words which follow, then it must be determined whether the things copyrighted here, or any of them, are "pictorial illustrations" within the intent of the legislation. I think that no one of them is. On the contrary, I think that Congress meant by those words, a pictorial representation placed in a book or other publication, to elucidate the text.

In defining the word "illustration" the Century Dictionary used substantially that language.

If, however, disregarding this view, we are to construe the words "pictorial illustrations" in connection with the words "or works connected with the fine arts," then the plaintiffs' claim has quite as little support, inasmuch as works which are connected with a "cut" or "engraving" or "print" must necessarily be "pictorial illustrations" in a certain sense. If all parts of the language are to be construed as having reference to the fine arts, then in order to bring out the real meaning, we may disregard the words "or works," and correctly read the clause as though it read that in construing the words "engravings," "cut" and "print," they shall be held to apply only to "pictorial illustrations connected with the fine arts." But whether this is correct or not, the things copyrighted in this case in my judgment are neither "pictorial illustrations" nor "works connected with the fine arts," within the meaning of the law.

That there is a distinction between the useful arts and the fine arts is a fact which we must assume to exist, not only as matter of common knowledge, but from cases like Almy vs. Jones, 17 Rhode Island, 266, and from the definitions found in the dictionaries. For example, the fine arts are defined to be "those which seek expression through beautiful modes."

It may be altogether undesirable to undertake to fix

or describe in any set phrase the line of difference between the two. It may indeed be quite as difficult as it is undesirable to do so, but that there is a difference will be assumed by the court.

Inasmuch as the constitutional provision above referred to only authorizes Congress to promote the "useful arts," the curious might moot the question of the power to promote any but the useful arts, and consequently the lack of power to legislate to give exclusive privileges respecting the fine arts, unless in cases where they are also useful arts; but the court is limited to a consideration of the intention of Congress in the legislation regarding the fine arts which is thought to authorize this action, and the recovery of the enormous penalties demanded for the printing of the cheap show bills upon which the claim is based. The court in considering this case is limited to that because in its judgment that is the only question to be decided on the pending motion, though it involves, of course, the question of the validity of each of the copyrights mentioned. If the things copyrighted in this case do not come within the Statute, there is no occasion to go further.

That the pictures offered in evidence in this case are such as are connected with the fine arts, I do not for a moment agree, nor does the evidence leave any question upon the subject, which the court thinks it necessary to submit to the jury. That the picture which represents a dozen or more figures of women in tights with bare arms and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art or fine art, it is something to be regarded as merely frivolous, and to some extent immoral in tendency, though the court by no means intends to intimate that the nude is not perfectly admissible in the fine arts.

The same conclusion, but upon somewhat different reasons, might apply to the picture called the "Stirk Family Design," which, as we have seen, is only an illustration of trick or fancy bicycle riding.

As to the other picture, that known as the "Statuary Act Design," the same conclusions might generally be applied, but the proof appears to be that the copyright of this one is void upon another ground, viz., that it was

printed and a number of copies of it shipped to the circus agent as many as four days before the copies were either mailed or delivered to the Librarian of Congress in compliance with the provisions of Section 4956, and instead of being entitled to recover as to this particular picture, the plaintiffs having, before it was granted, marked upon it a statement that it was copyrighted, may have brought themselves within the penalty for that offense provided in Section 4963. And if the court were to submit the case to the jury at all it would also be its duty to comment upon that portion of the evidence of the plaintiffs which seemed to indicate a possible publication of the two other pictures before the time of application for the copyright.

The court, indeed, might have grave doubts whether the Courier Litho. Co., which is a mere trade name of a certain department of the business of the unincorporated association known under the laws of New York as the Courier Company, is or can be the author, inventor, designer or proprietor of any of the things copyrighted within the meaning of Section 4952. The Courier Litho. Co. is a legal nonenity—that is to say, it is not a natural or legal person with any power to be a proprietor; it is certainly not the author, inventor or designer of the things copyrighted, and how it, under the circumstances, can be the proprietor of it is not clear to the court. Nor has any title in it been shown, unless it be that a title would result from the fact that a designer in the employ of the Courier Company designed one, or possibly two, of the pictures, though plaintiffs do not make it at all clear who designed any but the Statuary Act Design. Certainly it is not made clear that they, or any employe of theirs, designed either of the others.

Of course, the Librarian of Congress does not inquire into the matter of right when granting a copyright. He only states who claims the title, and leaves the courts to pass upon its validity. And notwithstanding the cases of Colliery, etc., Co. vs. United States, etc., Co., 94 Fed. Rep. 153, and Werckmeister vs. Pierce, etc., Co., 63 Fed. Rep. 445, and Scribner vs. Clark, 50 Fed. Rep. 473, and Lawrence vs. Dana, 15 Fed. Cases, and Callaghan vs. Myers, 126 U. S. 617, which discuss a general proposition, I would be in much doubt about the right of the Courier Litho. Co. to two of these copyrights in view of the evident design of the constitutional and statuary provisions to which I have referred to give the inventor or author the exclusive right, although if the six other plaintiffs had obtained the copyrights in their own individual names, or in that of the unincorporated association recognized

by the laws of New York, it might be that the court should not hold that the actual inventor might not have previously transferred his rights by acts in pais, or by such as should be construed to be an equitable assignment of those rights. The trouble in this case is that there was never any sort of transfer, equitable or otherwise, to the Courier Litho. Co., and that no right, therefore, existed in that unreal concern. It had no legal right to own or to be the proprietor of anything. These remarks do not apply to the Statuary Act Design, because in that case the copyright was granted to the Courier Company.

However, the court does not feel called upon to pass definitely upon this question, as in its opinion, the case must turn upon the others, and especially upon the general proposition that the things copyrighted in this case were by no means such as either the constitution or the legislation of Congress intended to protect by the privilege of copyrights. The court can not bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them.

As previously stated, they are neither "pictorial illustrations" nor "works connected with the fine arts" within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not.

The judgment of the court is, that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it.

Walter Evans, Judge.

Dec. 13, 1899.

And thereupon the court sustained the motion of the defendant and instructed the jury to find for it, and so charged the jury; to which the plaintiff, by counsel, in the presence of the jury, excepted.

And thereupon, in accordance with said instruction of the court, the jury returned a verdict in the words and figures following, to wit:

We, the jury, find for the defendant.

The court thereupon entered judgment in favor of the defendant and against the plaintiffs, which judgment was and is in the words and figures following, to wit:

It is ordered that the defendant have and recover of the plaintiffs the costs herein had and expended to be taxed by the clerk.

To which order of said court entering said judgment the plaintiff, by counsel, then and there excepted, and upon motion of the plaintiffs, by counsel, the plaintiffs are allowed sixty days to prepare and present their bill of evidence and exceptions herein.

And now comes the plaintiffs, by counsel, and tender in open court this their true bill of exceptions herein, and pray that the same may be allowed, signed, sealed and made a part of the record in this cause, and which is accordingly done this 20th day of January, A. D. 1900.

Witness the hand and seal of the court.

Walter Evans, Judge.

United States of America, District of Kentucky, ss.:

I, Jos. C. Finnell, Clerk of the Circuit Court of the United States for the Sixth Judicial Circuit and District of Kentucky, at Covington, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause set out in the caption hereto, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Covington, Kentucky, this 8th day of January, 1900.

(Seal.) Jas. C. Finnell, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable the Judge of the Circuit Court of the United States for the District of Kentucky—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of the Courier Company and the Courier Lithographing Company, plaintiffs, and The Donaldson Lithographing Company, defendant, a manifest error hath happened, to the great damage of the said George Bleistein, John W. Bridgman, John A. Rudolph,

Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business as the Courier Company and the Courier Lithographing Company, as by judgment complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* day of next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

(Seal.) Jos. C. Finnell,
Clerk of the Circuit Court of the United States.

Allowed by
Walter Evans, Judge.

*Not exceeding 30 days from the day of signing the citation.

2128. George Bleistein et al., vs. The Donaldson Litho. Co. Writ of Error. Filed Jany. 20, 1900. Jos. C. Finnell, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

To The Donaldson Lithographing Company—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the* seventeenth day of February next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Kentucky, wherein George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt

B. Lansing and Edwin Fleming, doing business as the Courier Company and the Courier Lithographing Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

Walter Evans, Judge.

*Not exceeding 30 days from the day of signing.

I hereby certify I received this writ on the 24th day of January, 1900, and that I personally served the same this 25th day of January, 1900, upon said defendant, the Donaldson Lithographing Co., by delivery to Wm. M. Donaldson, its president, a true copy of the within at his residence in Dayton, Ky., on 25th day of January, 1900.

This, therefore, returned executed as the law directs, this 26th day of January, 1900.

Fee, 2.18.

A. D. James, U. S. Marshal,
By J. D. Compton, Deputy.

2128. E—267. George Bleistein et al., vs. The Donaldson Lithographing Co. Citation.

And afterwards to wit on February 10th 1900, præcipe for appearance was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1899.

GEORGE BLEISTEIN ET AL.
vs.
DONALDSON LITHOGRAPHING CO. } No. 819.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiffs in error.

CHARLES J. HELM.

And afterwards to wit on April 3rd 1900 a stipulation to extend time for preparation of briefs was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN and Others, Plaintiffs in Error,
vs.
THE DONALDSON LITHOGRAPHING COMPANY, Defendant in Error.

It is hereby stipulated that the plaintiffs in error may have twenty days' further time from the 3rd day of April in which to prepare and file their briefs in this case.

E. W. KITTREDGE &
COBB & HOWARD,
Attorneys for Defendant in Error.

And afterwards to wit on June 7th 1900, an entry was made upon the journal of said court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL.
vs.
DONALDSON LITHOGRAPHING CO. } Before Judges Lurton, Day, and Severens.

This cause is argued for appellant by Mr. Ansley Wilcox and continued until tomorrow for further argument.

And afterwards to wit on June 8th 1900 an entry was made upon the journal of said court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL. *vs.* DONALDSON LITHOGRAPHING CO. } Before Judges Lurton, Day, & Severens.

This cause is argued further for plaintiffs in error by Mr. Ansley Wilcox and for the defendant in error by Messrs. E. W. Kittredge and Orris P. Cobb and is submitted.

And afterwards to wit on November 7th 1900, judgment was rendered in said cause clothed in the words and figures as follows:

Judgment.

United States Circuit Court of Appeals for the Sixth Circuit.

GEORGE BLEISTEIN ET AL. *vs.* THE DONALDSON LITHOGRAPHING CO. } No. 819.

Error to the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause be and the same is hereby affirmed with costs.

And afterwards to wit on November 20th 1900, an opinion was filed in said cause which reads and is as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

THE COURIER LITHOGRAPHING CO., Plaintiffs in Error, *v.* THE DONALDSON LITHOGRAPHING CO., Defendant in Error. } No. 819. Error to the Circuit Court of the United States for the District of Kentucky.

Submitted June 8, 1900; decided Nov. 7, 1900.

Before Lurton, Day, and Severens, circuit judges.

This was an action by the plaintiffs in error based upon section 4965 of the Revised Statutes of the United States as amended by the acts of March 3, 1891, and March 2, 1895, to recover the penalties prescribed for infringement of copyrights. The petition set forth three separate causes of action under that section, and alleged

that the defendant had violated the plaintiffs' copyrights in three different lithograph prints copyrighted under the following titles:

1. "Spectacular ballet design."
2. "Stirk Family design."
3. "Statuary act design."

The marshal seized, on the day the action was begun, 10,590 copies of the infringing publication in an eight-page form, 13,205 copies of a four-page form, and five metal electrotype plates, found in the possession of the defendant. The copyrighted articles are in colors, and are properly chromo-lithographs. The alleged infringements are smaller reproductions, not in colors, made from electrotype plates.

At the conclusion of the evidence for the plaintiffs the court instructed the jury to return a verdict for the defendant. There were some exceptions to the exclusion of evidence offered by the plaintiffs, but none of the errors assigned thereon are material, as the case must turn upon the questions involved in the instruction to find for the defendant.

The plaintiffs sue as members of a joint stock association under the law of New York, known as "The Courier Company," but doing a part of their business under the name of the "Courier Lithographing Company." Two of the copyrights in question were copyrighted in the name of the "Courier Company" and one in the name of the "Courier Lithographing Company," that known under the title of the "statuary design." The titles of the first two named were deposited with the Librarian of Congress April 11, 1898. The last was deposited April 18, 1898, though it was in evidence that the application and title was deposited in the mail addressed to Librarian of Congress on April 15, 1898. A large number of prints of each of said designs were shipped April 11, 1898, by the plaintiff company from Buffalo, N. Y., to the agent of the Wallace circus at Peru, Ind., for circulation and distribution. The time of arrival at Peru is not shown.

The evidence established that these prints were ordered by E. B. Wallace, proprietor of a circus known as the "Wallace show," as advertising matter for the show. Plaintiffs' evidence tended to show that Mr. Wallace's order constituted what is styled an order for "special paper"—that is, they were show-bills designed especially for him, and which are sold only to the person making the order so long as he chooses to supply himself with them for his show. The witness said, that "if he ceases to use that bill, say he does not do the 'Statuary act' next year we have the right to sell the design to other people who may want to use that sort of thing."

Plaintiffs' evidence also tended to show that the "design" or "conception" was that of an employé working under a salary for them, and that his "designs" were the property of the employer, and therefore copyrighted by them.

The spectacular ballet design, as shown by the print itself, is a picture of a number of ballet dancers in the conventional dress, short skirts, tights, bare shoulders and arms. The Stirk Family design is a representation of fancy bicycle riding by male and female riders. The statuary design is a representation of the landing of

Columbus and several other historic or classic events. All purport to be representations of acts to be done in the Wallace show, and all were made under a representation by Wallace that his show was going to do these things, and that he wished these acts represented on colored bills for exhibition in windows as advertisements for his show. All the bills contained reading matter indicating that these were acts to be done in Wallace's show, and included pictures of Mr. Wallace himself. The copies of the several publications, deposited as required by the statutes with the Librarian of Congress, included this reading matter and picture of Mr. Wallace.

By comparing the copyrighted prints with those seized and put in evidence as proof of infringement, it is shown that the latter are also show-bills for the Wallace show. Though diminished in size and printed only in black ink, they appear to be substantially reproductions of the designs in the copyrighted publications. There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were "the creations of our employés."

Evans, district judge, was strongly of opinion that none of the copyrighted prints were entitled to be copyrighted, and upon this and other grounds, unnecessary to be now considered, so instructed the jury.

LURTON, circuit judge, having made the foregoing statement of the case, delivered the opinion of the court.

The copyrighted chromos or prints were designed to be pictorial representations of acts done in the Wallace circus. That they were designed and intended for advertising purposes only is undisputable. They may be "creations" in the sense that they are not exact reproductions of the acts they advertise. But that the arrangement, pose, color, grouping or expression is new or original does not appear in the evidence, nor can we assume it from an examination of the prints themselves. Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value. But they are "chromos" or "prints," and chromos and prints are included in the list of productions which, under the statute, may be copyrighted. But are all chromos and prints unqualifiedly entitled to the protection of the copyright law? Must such a construction be given the statute? The power of Congress in this respect is derived from that section of article 1 of the Constitution which gives to it the power "to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries."

In the Trade-mark cases, 100 U. S. 82, the court held that "while this word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original and are founded in the creative powers of the mind."

In Lithographic Co. *v.* Sarony, 111 U. S. 53, the court approved the definition of *author* by Lord Justice Cotton in Nottage *v.* Jackson,

11 Q. B. Div. 627, where the distinguished judge said: "In my opinion, 'author' involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph."

In the Saroney case, just cited, the court reserved the question as to whether an ordinary photograph was the subject of a copyright, but sustained a copyright upon a finding of fact that it was "a useful, new, harmonious, graceful picture, and that plaintiff made the same entirely from his own original mental conception, to which he gave mental form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies and other accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression." In other words, the court found, that a photograph might be something more than a mere mechanical and chemical product, and might rise to the dignity of art through the blending of the mechanical parts of the process with the original intellectual conceptions of an artist. Commenting upon the fact that under our copyright law it is only necessary to deposit the title and two copies of the publication to secure a copyright, and that no tribunal, as is the case in respect of an application for a patent, is provided for passing upon the originality of the matter offered for copyright, the court in the same case said:

"It is, therefore, much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought and conception on the part of the author should be proved, than in the case of a patent right."

In Higgins *v.* Keuffel, 140 U. S. 428, the court, referring to the constitutional power of Congress over the subject of copyrights, said:

"It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts. A label on a box of fruit giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black' or 'white' or 'sweet,' or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink as 'black,' 'blue' or 'red' or 'indelible' or 'insoluble,' or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

In Baker *v.* Selden, 101 U. S. 99, 106, the court quote- with seeming approval from the case of Cobbett *v.* Woodward, L. R., 14 Eq. 407, where it was held that an illustrated catalogue of furniture was

not the subject of copyright when it was designed "solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser."

The same ruling was made by Woodruff, circuit judge, in Collender *v.* Griffith, Fed. Cases No. 3,000. Cobbett *v.* Woodward has since been overruled, but, as pointed — by Jenkins, circuit judge, in Mott Iron Works *v.* Clow, 82 F. R. 320, the cases overruling it are to some extent due to the difference between the English statutes and our own, and therefore not pertinent.

In Mott Iron Works *v.* Clow, cited above, the court of appeals for the seventh circuit reached the conclusion that "mere advertisements, whether by letter, press or by pictures, are not within the protection of the copyright law."

The exigencies of the case in hand do not require that we should express any opinion upon the broad subject. It may be that a picture, or lithograph, or engraving, though intended to be reproduced in prints and used as an advertisement, is entitled to the protection of the copyright law, notwithstanding the use for which it is designed.

In Yuengling *v.* Schile, 12 F. R. 97, 101, a chromo entitled "Gambrinus and his followers," intended as a glorification of lager-beer drinking, and designed and circulated as an advertisement of the publisher's business as a lager-beer brewer, was regarded by Brown, district judge, as the proper subject of copyright. The learned judge distinguished the matter from the case of Cobbett *v.* Woodward, Collender *v.* Griffith and Ehret *v.* Pierce, 10, F. R. 553, upon the ground that the copyrighted articles in these cases were not works of art, and had no value as such, and were mere modes of advertising. The chromo of Gambrinus in question, he held, was "a work of the imagination, and has such obvious artistic qualities as in my judgment render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it." To the same effect is the case of Schumaker *v.* Schwencke, 25 F. R. 466, and the case of Lamb *v.* Grand Rapids School Furniture Company, 39 F. R. 474.

What we hold is this, that if a chromo, lithograph or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision to protect the "author" in the exclusive use thereof and the copyright statute should not be construed as including such a publication if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the

meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.

We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error.

Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them in view of the conclusion already announced.

The judgment must be affirmed.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of George Bleistein *et al. vs.* The Donaldson Lithographing Co. No. 819, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 25th day of May A. D. 1901.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. George Bleistein *et al. vs.* Donaldson Lithographing Co. Certificate for copy of transcript of record.

Supreme Court of the United States.

George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, *vs.* The Donaldson Lithographing Company, Defendant in Error.	At Law. Petition for Writ of Error.

The petition of the plaintiffs in error above named respectfully shows:

1. That this action was begun in the United States circuit court

for the district of Kentucky, by the plaintiffs in error above named against the defendant in error above named, based upon section 4965 of the Revised Statutes of the United States and amendments thereto, to recover for the violation of the plaintiffs' copyrights in three different chromos or colored lithographic prints, also called chromo-lithographs, copyrighted under the following titles respectively:

(1.) "Spectacular ballet design,"
(2.) Stirk Family design,"
(3.) Statuary act design."

2. That the action was tried at Covington, Kentucky, December 12 and 13, 1899, before Hon. Walter Evans, sitting as circuit judge, and a jury; that at the conclusion of the plaintiffs' evidence the court held, as a matter of law, that the plaintiffs' said chromo-lithographs were not entitled to the benefits of the copyright statutes of the United States, and granted a nonsuit or peremptory direction of a verdict for the defendant; and that judgment was entered on said verdict as follows:

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"It is ordered that the defendant have and recover of the plaintiffs the costs herein had and expended, to be taxed by the clerk."

3. That the plaintiffs in error above named duly sued out a writ of error to the United States circuit court of appeals for the sixth circuit; that all necessary proceedings were thereupon taken, and the case duly presented to said circuit court of appeals; and that said court rendered judgment, on November 7, 1900, affirming the said judgment of the United States circuit court for the district of Kentucky.

4. That the matter in controversy in this case exceeds the sum of $1,000 besides costs; and that the case arose under the copyright laws of the United States and, therefore, is not one in which the determination of the United States circuit court of appeals is final, but is one in which there is, of right, a writ of error or review of the case by the Supreme Court of the United States, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, etc." approved March 3, 1891; and that one year has not elapsed since the entry of the judgment sought to be reviewed.

5. That the petitioners, the plaintiffs in error above named, are aggrieved by the said judgment of the United States circuit court for the district of Kentucky, and by the judgment of the United States circuit court of appeals for the six circuit affirming the same; and that errors were committed to the prejudice of the plaintiffs in error on the trial of said action, and in the affirmance of the judgment, which are set forth in the assignment of errors to be filed with this petition.

Wherefore the petitioners, the plaintiffs in error above named, pray that a writ of error may issue in their behalf directed to the United States circuit court of appeals for the sixth circuit to the end that a transcript of the record, proceedings and papers in this action, duly authenticated, may be sent to the Supreme Court of the United States; and that the said judgment of the United States circuit court

of appeals for the sixth circuit and the said judgment of the United States circuit court for the district of Kentucky, be reviewed, the errors complained of corrected, and the said judgments reversed.

Dated, May 18th, 1901.

WILCOX & MINER,
Attorneys for Plaintiffs in Error,
816 *Ellicott Square, Buffalo, N. Y.*

ARTHUR VON BRIESEN,
ANSLEY WILCOX,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, vs. THE DONALDSON LITHOGRAPHING COMPANY, Defendant in Error.	At Law. Assignment of Errors.

The plaintiffs in error above named, by Wilcox & Miner, their attorneys, make the following assignment of errors in this action in connection with their petition for a writ of error herein, and allege that in the record and proceedings there is manifest error as follows:

I.

The trial court erred in the rejection of evidence offered by the plaintiffs upon the trial in the following instances:

(1.) In rejecting as evidence the following parts of page 129 of vol. 15, No. 2, whole No. 354, April 20, 1898, of "Catalogue of title entries of books and other articles entered in the office of the register of copyrights, Library of Congress, at Washington, D. C., under the copyright law, wherein the copyright has been completed by the deposit of two copies," which were offered by the plaintiffs, to wit:

"Spectacular ballet design (1898, No. 22,966, Apr. 11, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Statuary act design (1898, No. 24,345, Apr. 18, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

"Stirk Family design (1898, No. 22,959, Apr. 11, 2 copies received Apr. 11, 1898).

Copyright by Courier Lithographing Company, Buffalo, N. Y."

(See printed record in the circuit court of appeals, page 28.)

(2.) In refusing to allow the witness George Bleistein to answer and tell the jury what was the custom of the trade in regard to the

ownership or control of "special matter," which it was avowed he would do as follows: "The custom of the trade when special matter is ordered is that it shall not be used during the continuance of the contract for other parties than those ordering it; but that thereafter it may be used at the pleasure of the company printing it."

(See printed record in the circuit court of appeals, page 33.)

(3.) In refusing to allow the plaintiffs to introduce in evidence a negative and photograph printed from it, of the spectacular ballet design reducing the size of the picture from that of the plaintiffs' chromo-lithographs to that of the prints made by the defendant and seized by the marshal.

(See printed record in the circuit court of appeals, page 41.)

(4.) In refusing to allow the plaintiffs to show by the witness, Bleistein, that the employé, Bandlow, who made the designs of the lithographs, Exhibits "A," "B" & "C," had been engaged in making similar lithographic designs which were copyrighted by the plaintiffs, under the name of the Courier Lithographing Company, as proprietors, during the four years through which it had been shown that he had been employed by the plaintiffs.

(See printed record in the circuit court of appeals, page 35.)

II.

The trial court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III.

The trial court erred in overruling the motion of plaintiffs for a new trial, and in entering judgment in favor of the defendant and against the plaintiffs.

IV.

The circuit court of appeals erred in not reversing the judgment of the trial court, because of the errors above mentioned, and because of any one of said errors, and also erred in affirming the judgment of the trial court.

V.

The trial court and the circuit court of appeals erred in holding that the "statuary act design" was not a proper subject of copyright.

VI.

The trial court and the circuit court of appeals erred in holding that the "Stirk Family design" was not a proper subject of copyright.

VII.

The trial court and the circuit court of appeals erred in holding that the "spectacular ballet design" was not a proper subject of copyright.

Wherefore the plaintiffs in error above named pray for the judgment of this court reversing the judgment of the United States cir-

cuit court for the district of Kentucky in favor of the defendant in error and against the plaintiffs in error above named, entered upon a verdict directed by the court after a trial had on the 12th and 13th days of December, 1899, and also the judgment, rendered November 7, 1900, of the United States circuit court of appeals for the sixth circuit, affirming the same.

Dated, May 18th, 1901.

WILCOX & MINER,
Attorneys for Plaintiffs in Error,
816 *Ellicott Square, Buffalo, N. Y.*

ARTHUR VON BRIESEN,
ANSLEY WILCOX,
Of Counsel for Plaintiffs in Error.

[Endorsed:] Copy. Supreme Court of the United States. George Bleistein and others, doing business as The Courier Company, &c. pl'ffs in error, *vs.* The Donaldson Lithographing Company, def't in error. Petition for writ of error and assignment of errors. Wilcox & Miner, attorneys for pl'ffs in error, office and P. O. address, room 816 Ellicott square, No. 295 Main street, Buffalo, N. Y. Arthur von Briesen, Ansley Wilcox, of counsel.

Bond on Writ of Error to the Supreme Court of the United States.

Know all men by these presents:

That we, George Bleistein, John W. Bridgman and others, doing business as the Courier Company, of Buffalo, New York, as principals, and Worthington C. Miner and Elizabeth Bleistein, of Buffalo, New York, as sureties, are held and firmly bound unto The Donaldson Lithographing Company in the full and just sum of five hundred dollars ($500), to be paid to the said The Donaldson Lithographing Company, its certain attorneys, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eighteenth day of May in the year of our Lord one thousand nine hundred and one.

Whereas, lately, at a stated term of the United States circuit court of appeals for the sixth circuit, in a suit pending in said court between George Bleistein, John W. Bridgman, John A. Rudolf, Ansley Wilcox, Gerrit B. Lansing and Edwin Fleming, doing business as The Courier Company and The Courier Lithographing Company, plaintiffs in error, and the said The Donaldson Lithographing Company, defendant in error, a judgment was rendered and entered on the 7th day of November, 1900, against the said plaintiffs in error, and in favor of the said defendant in error, affirming the judgment of the United States circuit court for the district of Kentucky, rendered and entered on or about the 13th day of December, 1899; and the said plaintiffs in error having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judg-

ment in the aforesaid suit, and a citation directed to the The Donaldson Lithographing Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said George Bleistein and others, doing business as the Courier Company, &c., plaintiffs in error, shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE COURIER COMPANY,
G. BLEISTEIN, *Pres't.* [L. S.]
WORTHINGTON C. MINER. [L. S.]
ELIZABETH BLEISTEIN. [L. S.]

Sealed and delivered in presence of—
WM. J. P. SEIPP.

Approved June 3d, 1901.
(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK, } ss:
Erie County, City of Buffalo, }

On this 18th day of May, 1901, before me personally appeared George Bleistein, Worthington C. Miner and Elizabeth Bleistein, each of whom is personally known to me, and known to be the persons who executed the foregoing instrument, and they then severally acknowledged the execution thereof; and the said George Bleistein acknowledged that he executed the same as and for the act and deed of the Courier Company, an unincorporated joint stock association, of which he is the president.

Given under my hand and official seal the day and year first above written.

[L. S.]
WM. J. P. SEIPP,
Notary Public in and for Erie County, N. Y.

STATE OF NEW YORK, } ss:
Erie County, City of Buffalo, }

Worthington C. Miner and Elizabeth Bleistein, the sureties in the foregoing bond, being severally duly sworn, each for himself or herself does depose and say:

The said Worthington C. Miner, that he is a householder residing in the city of Buffalo, New York, and is worth the sum of $1,000. over and above all debts and liabilities, and not including property which is exempt by law from execution;

And the said Elizabeth Bleistein, that she is a freeholder and householder residing in the city of Buffalo, New York, and that she

is worth the sum of $1,000 over and above all debts and liabilities, and not including property which is exempt by law from execution.

WORTHINGTON C. MINER.
ELIZABETH BLEISTEIN.

Subscribed and sworn to before me this 18th day of May, 1901.

[L. S.] WM. J. P. SEIPP,
Notary Public in and for Erie County, N. Y.

[Endorsed:] Copy. Supreme Court of the United States. George Bleistein and others, doing business as The Courier Company, &c. pl'ffs in error, *vs.* The Donaldson Lithographing Company, def't in error. Bond on writ of error. Wilcox & Miner, attorneys for pl'ffs in error, office and P. O. address, room 816 Ellicott square, No. 295 Main street, Buffalo, N. Y. Arthur von Briesen, Ansley Wilcox, of counsel.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company and The Courier Lithographing Company, plaintiffs in error, and The Donaldson Lithographing Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 3d day of June, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

In pursuance to the command of the foregoing writ of error I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, herewith transmit a true copy of the record, assignments of error and bond and all proceedings in this case of George Bleistein *et al. v.* The Donaldson Lithographing Company lately pending in the United States circuit court of appeals for the sixth circuit, under my hand and the seal of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth.

Seal United States Circuit Court of Appeals, Sixth Circuit.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Stamp:] Filed Jun- 8 1901 Frank O. Loveland, clerk.

UNITED STATES OF AMERICA, ss:

To The Donaldson Lithographing Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company, and The Courier Lithographing Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 3d day of June, in the year of our Lord one thousand nine hundred and one.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

I hereby, this 24th day of June, 1901, accept due personal service of this citation on behalf of The Donaldson Lithographing Company, defendant in error.

ORRIS P. COBB,
JOSEPH WELBY,
E. W. KITTREDGE,
Solicitors for Defendant in Error.

[Endorsed:] File No. 18,199. Supreme Court U. S., October term, 1901. Term No. 346. George Bleistein *et al.*, P. E., *vs.* The Donaldson Lithographing Co. Copy of citation & acknowledgment of service of same. Office Supreme Court U. S. Filed Jul-2 1901. James H. McKenney, clerk.

Endorsed on cover: File No. 18,199. U. S. C. C. of appeals, 6th circuit. Term No. 346. George Bleistein, John W. Bridgeman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing & Edwin Fleming, doing business under the name of The Courier Company & The Courier Lithographing Company, plaintiffs in error, *vs.* The Donaldson Lithographing Company. Filed June 11th, 1901.